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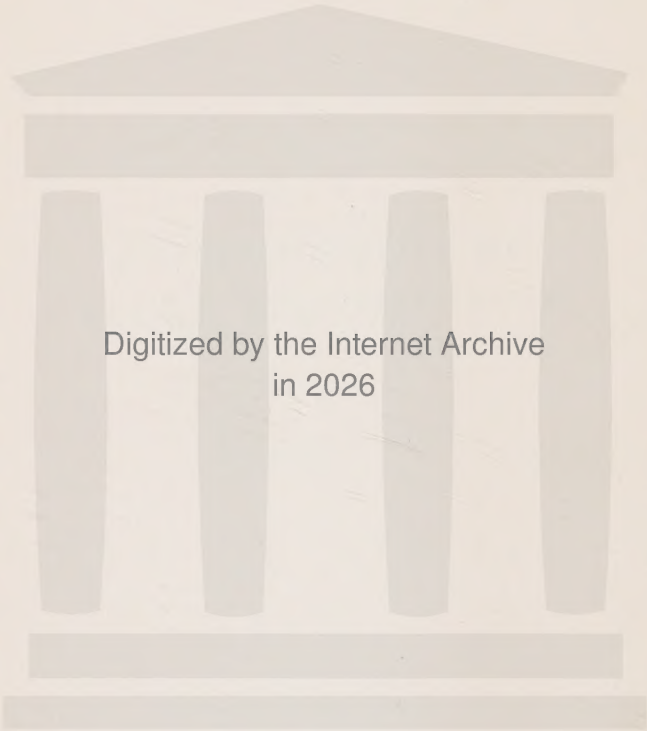
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THE RECONCILIATION OF GOVERNMENT WITH LIBERTY

BY

JOHN W. BURGESS, PH.D., JU.D., LL.D.

FORMERLY PROFESSOR OF POLITICAL SCIENCE AND CONSTITUTIONAL LAW, AND DEAN OF THE FACULTIES OF POLITICAL SCIENCE, PHILOSOPHY AND PURE SCIENCE, IN COLUMBIA UNIVERSITY

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INTRODUCTION

It has been the search of the ages to find a political system, the travail of the ages to construct one, in which Government and Liberty shall be reconciled, in which each of these all-comprehending means of civilization shall strengthen the other and in which finally each shall be the fulfilment of the other. Down to the present moment this millennial equilibrium has not been fully attained and mankind always has been, and still is, in danger of diverging from the true path which leads to it, towards despotism on the one side or anarchy on the other. The only protection against these dangers is a correct and profound appreciation of the historical development of the state. Such a study is, however, so exacting, not to say exhausting, that it must be made for the mass of men as brief and concise as possible.

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BOOK I

ASIA AND AFRICA

CHAPTER I

THE EFFORT OF ASIA TO SOLVE THIS PROBLEM

It has not escaped the observation of deep thinkers that the genius of Asia has been religious, rather than political, while that of Europe has been predominantly political. Asia has originated, with the exception perhaps of Druidism, all the great religions of the world; while Europe and her offspring, the Americas, have originated all the great states of the world. The result of this psychological character has been that almost all the Asiatic states must be classed as theocracies or as despotisms based upon the theocratic principle. Now, such states sacrifice Liberty to Government, and do not even recognize with any clearness the existence of the problem of the reconciliation of Government with Liberty. The study of the Asiatic states cannot, therefore, be of much service in elucidating the subject which we have set before ourselves in this work. Nevertheless we can, with careful study, perceive, in some of the Asiatic states, a certain appreciation of this problem, and a certain effort to meet it.

The Continent of Asia contains some seventeen and one-half million square miles of territory inhabited by about one thousand millions of men. One-half of this territory and one-third of this population, speaking roughly, are

subject to two great European states, viz.: Great Britain and Russia. All of this we leave, of course, out of consideration in the inquiry regarding the contribution of Asia to the solution of our problem. On the other half of its territory and among the other two-thirds of its population, ten sovereign and independent states exist to-day, viz.: Afghanistan, Arabia, Bhotan, China, Japan, Nepal, Oman, Persia, Siam, and Turkey. Of these ten, only four have placed any limitations upon despotic Government deserving mention, that is, only four have contributed anything toward the solution of our problem. These are China, Japan, Persia, and Turkey.

First and foremost among these four is China, the oldest of them all, the largest and the one which has held itself freest from foreign influence down to the most modern period of history. The basis of China's most ancient political system was a code of morals rather than, as in the case of most Asiatic states, a religion. That made a very wide difference between China and, we will say, India from the very start. That established the state upon a human, instead of a divine, basis and opened the way for the principle of a limitation upon governmental power by human reason and will.

The political history of China begins, so far as we have any accurate knowledge of it, some twenty-three centuries before the Christian era. The Emperor Chun appears to have begun in this period the political organization of that part of China which became the nucleus of the great Empire. For something more than a thousand years his successors carried forward his work, developing a more and more despotic power in the Emperor and the devolution of this power by hereditary right, and at the same time laying the foundation for a feudal system by trusting the

administration of the provinces and districts of the Empire to officials, whose duty to the Emperor was the rendering of military service and the payment of tribute, and whose powers in their provinces and districts were undefined and unlimited. Naturally, these officials also gradually developed the principle of hereditary right in the Government of their respective provinces or districts; and the first clash between their claims and the Emperor's assertion of sole authority ended in the revolution of the eleventh century before the Christian era, when one of the great feudal lords, Won Wang, Prince of Tchu, overthrew the Emperor, the last of the second or Chang dynasty, and assumed the Imperial power himself.

Under the Won Wang dynasty China became in theory as well as fact a feudal system, and while it prospered and developed in many ways, it nevertheless followed the inevitable course of the feudal system toward anarchy and disruption. It took China, however, some three hundred years to reach this extreme final result. It was about two hundred and fifty years before the Christian era that a great feudal Prince, Tsin-Chi-Hoang-Ti, not only deposed the Won Wang Imperial dynasty but overthrew the independence and power of the feudal Princes and restored the unity of the Empire under the sovereignty and sole governmental power of the Emperor. The danger to civilization now was that the restored Imperial power would become an unlimited despotism, and that instead of finding some solution of the problem of reconciling Government with Liberty, Government would suppress and destroy Liberty.

Already two hundred and fifty years before the overthrow of the feudal system and the restoration of the Imperial sovereignty, China's great sage, Confucius, had lived and taught. We have from his own hand but very

little. He had a large number of disciples, and taught them carefully and assiduously, and he travelled from one to another of the feudal Princes endeavoring to impress upon them moderation in their Government and the love of their fellow men. His system as preserved and handed down by his disciples was a great code of morals rather than the principles of a religion, and so far as his teachings related to politics and Government, his purpose was to temper the despotic power of the Prince over his subjects by a benevolent disposition in the exercise of it. He was no revolutionist, and never taught violent resistance to established authority. He only sought to teach the Princes the principles and axioms of benevolence in Government and to induce them to apply them. Before the beginning of the Christian era, the Confucian system of morals, as handed down by his disciples, had become the universal cult in China and was moulding both the public and private character of the Chinese. It was a system of a high order, not so far removed from the system of Christian morals as most men think, and its adoption as the rule of life gave China a civilization which has endured to the present day.

The new dynasty of Tsin, which overthrew the feudal system and restored the Imperial sovereignty, was quick to observe the limitations upon the Imperial power contained in the ethical system of Confucius and endeavored to get rid of them by destroying the books which contained it, and putting to death the disciples who taught it. It may have been the offense thus given to the moral sense or moral rules, perhaps, of the people which brought that dynasty to its sudden downfall. Certain it is that the succeeding Imperial dynasty, the dynasty of Han, which came to the Imperial throne some two hundred years before

the beginning of the Christian era, was most assiduous in gathering together and preserving the remnants of the ancient books, in honoring the memory of the great sage and in re-establishing his cult.

This dynasty sat upon the Imperial throne for more than four hundred years and under it the ethical principles of Confucius in respect to Government became the system of constitutional limitations upon despotic power. They became, not only the basis of the education of the members of the Imperial house and household, but also of all the chief officials. With all this, however, the way was still open for the arbitrariness of Government so long as the authoritative interpretation of the Confucian principles of benevolence in Government was ultimately and exclusively in the hands of the Emperor and his officials themselves. It was undoubtedly for the purpose of meeting and curing this constitutional weakness, made continually apparent in practise, that the famous Council of Censors was created, consisting of a President and forty to fifty members, entirely independent of the Government and forming no part thereof and charged with the duty of protecting the welfare of the people against all attempted arbitrariness in the administration, by reporting the same to the Emperor and even warning him against allowing it. In order to carry out this great purpose, the entire Empire was divided into districts and one or more Censors were assigned to duty in each, the duty of watching over all governmental proceedings therein and reporting the same to the Council of Censors. In the language of modern political science we would say that this Council of Censors was a sort of supreme court for the final interpretation of the principles of the Confucian limitations upon the despotic actions of the Government, in behalf of the so-called natural rights and

welfare of the subjects. Its members were, of course, appointed by the Emperor and, so far as the theory of the Imperial despotism was concerned, could be deposed by him, but the Confucian ethics had sunken so deeply into the consciousness of the Chinese that such action on his part, unless supported by general approval, would have endangered his throne. In fact, so far as we know, it was almost never undertaken. This was certainly an excellent political system for Asia, the mother of religions and theocracies, to have produced at all, and certainly so at that early age in the world's civilization. It enabled China to live and prosper under changes of Imperial dynasty down to the last decade of the last century of the Christian era with very little help or influence from the outside world; and it has prepared China to finally appropriate the European political ideas, principles, and forms with far less difficulty and with much greater naturalness, more as evolution than as revolution, than any other Asiatic country.

Unhappily, however, for China—perhaps unhappily—the power and influence of the Council of Censors and of the Confucian principles generally declined from century to century under the Manchu dynasty. The Manchus, and the Mongol conquerors before them, had no such appreciation of these doctrines as the genuine Chinese. Apparently, at least, the Imperial power became more and more despotic and found ways to emancipate itself from the limitations upon arbitrariness imposed by the Council of Censors and either to repudiate the Confucian principles altogether or to interpret them in its own way. At the same time, and in some measure at least in consequence of this vicious development, discontent grew and spread and the influence of the West became stronger and stronger.

By the end of the nineteenth century it could no longer be with impunity disregarded.

In 1906 the Emperor sent out five commissioners to investigate the constitutional law of the most important states of the world. In November of 1908 the Emperor by edict undertook to octroy, as the French say, a Constitution. It did little more than ratify the existing state of affairs. At last, in 1911, the revolution broke over the unhappy land. It was quick and almost bloodless. An irregularly chosen assembly formed a provisional Constitution and elected a provisional President.

In respect to the question we are discussing, viz.: the reconciliation of Government and Liberty, it is not a very happy outcome. It contains, it is true, a Bill of Rights, similar in principle to what is to be found in most European Constitutions, in which religious liberty, the freedom of speech and of the press, freedom from illegal arrest, trial and condemnation, the freedom of peaceable assembly and petition to the Government, the freedom of movement and of occupation, the right to hold property, etc., are guaranteed. But no way is provided to enforce this guarantee against the almighty Legislature, and its enforcement against the Executive is intrusted to what is termed the Court of Administrative Litigation, that is, to a tribunal not furnished with the power and independence of the ordinary tribunals for administering justice between individuals, and the Courts generally are the creatures of ordinary statute law. Hence, although the Judges hold apparently by a constitutional tenure, the Legislature may by ordinary statute provide for their punishment, dismissal, and retirement, and they have no power to interpret the Constitution against a legislative act of any kind or in relation to any subject. The Judicial tribunals do not have

even the power or influence against the Government in behalf of Individual Liberty once possessed by the Council of Censors.

The framers of the present Chinese Constitution seem to have considered that the declared sovereignty of the people, a unicameral Legislature elected by the people and furnished with all legislative power and with the power to elect and depose the Executive and the power to create and control the Judiciary, were sufficient guarantees of Individual Liberty. For the benevolence of the Emperor, defined by the Confucian maxims as interpreted finally by the Council of Censors, they have substituted the benevolence of the almighty Legislature interpreted by its own conceit. In political theory they have sacrificed Liberty entirely to Government, and have destroyed the little which old China had contributed to the solution of the problem of the reconciliation of Government and Liberty. How it will turn out practically remains to be seen. It is true that the present Constitution and Government are termed provisional, but an article in a recent number of the *Atlantic Monthly* by Ching Chun Wang, pleading for the recognition of the Chinese Republic, declares that not too much stress should be laid upon the word provisional and indicates that the provisional organization is to be the permanent and regular one; and the tendency of the Asiatic mind to despotism in Government inclines us to believe that such will be the case, but it will be the despotism of the Executive rather than the Legislature.

In reviewing the history and present Constitution of Japan we reach, practically, the same result. Somewhere about two hundred and fifty years before the beginning of the Christian era a band of military adventurers from

China or Corea is said to have crossed over to the southwest corner of the Island of Japan and to have subjected the aborigines to their rule in the southwestern half of the island or to have driven them backward toward the northeast. They established themselves in the district around the present city of Kioto and, under the lead of their Chief, the Mikado, developed the earliest political system of Japan known to us, and gradually extended its sway over the entire island. As the military condition continued for many years after the invasion, so the military organization became substantially the civil organization; that is, the Mikado, the military Chieftain, was regarded as the source of all governmental power and authority and executed the functions of a civil nature, like those of a military nature, by his own appointed agents, subject at all times to his will and pleasure. He appointed from among his followers the Governors of provinces and districts, held them responsible to himself, and supervised the conduct of affairs. In European history the invasion and conquest of England by the Duke of Normandy and the establishment of his Government over the same was a movement of a similar nature to what happened more than a thousand years earlier in Japan.

For about eight hundred years this absolute, centralized, hereditary Government of the Mikado continued in active force, when the Governors of the provinces and districts of the Empire, the Daimaos, entered into a sort of conspiracy to secure greater independence against the Imperial power. The means they employed were those of craft rather than of force. Somewhere about the sixth or seventh century of the Christian era the religion of the Hindoo Siddhartha Gautama, the Buddha, made its way into Japan and displaced largely the ancient religion of

the people, Shintoism, the worship of Ancestors. The philosophical and ethical side of the Buddha's teachings do not seem to have been much regarded by the Japanese. They seem to have been almost entirely attracted by the Buddha's religious idea of renunciation of the world and absorption in Nirvana. The house of the Mikado became affected by it and the crafty palace officials under the influence of the Daimaos succeeded in inducing the Mikados to retire from the active work of Government, lead the life of the ascetics, and leave the administration of affairs to the Daimaos, each in his own district.

The decentralization thus introduced developed rapidly and was gradually leading the Empire to anarchy, when, in 1192, the powerful Daimao Minamoto Yoritomo succeeded in having himself appointed Majordomo, Shogun, by the existing Mikado and set out upon the policy of building up his own independent rule over the entire Empire. The system which he introduced was what was called in Europe about the same period the feudal system. Yoritomo gave to the Governors of the provinces and districts, the Daimaos, these provinces and districts as fiefs of the Crown; that is, he assumed to make the Daimaos and their hereditary descendants Lords of the soil of these provinces and districts and, as incident of such ownership, Governors over the vassals and subjects inhabiting them, reserving to himself the overlordship of the whole territory of the Empire and requiring from each Daimao military service and aides. His idea seems to have been, through this generosity to the Daimaos, to win them to his plan for displacing the Mikado. The result seems to have been that, while they cared little whether the Mikado or the Shogun, as Yoritomo and his descendants were called, held the nominal overlordship over them, they followed the old

decentralizing course with the purpose of establishing an independent state, each in his own province or district. By the beginning of the seventeenth century it had about come to that, when the capable, crafty, and energetic Daimao Tokugawa Ieyas, playing the rôle of a Charles Martel or, better, of a Louis XI, seized the Shogun power, deposed the Daimaos who would not subject themselves to him, and ruled the whole Empire either through his own appointed agents or through those Daimaos who would obey and execute his will.

During the Shogunate of the Tokugawas, which lasted from 1603 to 1868, the Mikado with the officials of his court and state, while nominally the Sovereign, remained in monkish retirement, while the Shogun, though nomially the agent and appointee of the Mikado, exercised all the powers of the Government according to his own will and pleasure.

In order to maintain this deception the Shoguns kept the people in densest ignorance. No education internally was encouraged and no intercourse with the outside world was permitted. A sinister and hopeless despotism was fastening itself, apparently finally, upon the unhappy land. In the middle of the nineteenth century, however, events began to shape themselves more favorably. In the first place, the ability and character of the Shoguns were on the decline. Then the crop failures brought, especially in the absence of a monetary system, great embarrassment to the treasury of the Shogun, which caused the desertion of many of his mercenaries. Then the forcing open of the ports of Japan by Commodore Perry's expedition, and similar action on the part of other Powers, were great factors, and finally the renaissance of Shintoism, the worship of Ancestors, closely connected with which was the duty

of loyalty to the Mikado, was in itself almost a revolution. All these things discredited profoundly the Shogunate in the minds of the people and led to the movement for restoring the Mikado and expelling the foreigner.

In 1868 the last Shogun returned his powers to the Mikado, Mutsuito, and the active Government of the Mikado was, after nearly seven hundred years of priestly retirement, restored. The movement which brought about this result, however, was of too popular a nature to be satisfied with the Mikadoate exactly as it was before 1192. The desire, not to say demand, for a modification of the absoluteness of the Mikado's Government was too strong to be ignored. The Mikado issued a manifesto in the first year of his restoration promising to admit representatives of the people to participation in the Government. Twenty years, however, passed before this promise was redeemed. Twenty years of absolute rule by the Mikado were regarded as necessary to prepare the country for a representative institution. At last, in the year 1889, a Constitution prepared by the Marquis of Ito, following rather closely the model of the Prussian Constitution, was proclaimed in force.

From a cursory view of this instrument, one might form the opinion that Japan had established a Constitution quite on the Western order, but a critical examination of it will quickly convince any constitutional lawyer that most of the provisions of the instrument, which make this favorable impression, are illusory. First of all, it must be kept in mind that in the period between 1868 and 1889 the Emperor, as we shall henceforth term the Mikado, and his chief officials, had created, on the basis of the Imperial autocracy, a complete system of laws and ordinances and of governmental administration for the Empire, and that

in the Constitution of 1889 all this was declared as continuing in force in so far as left unchanged by the provisions of the Constitution, which itself was only an Imperial edict, and changed the existing law, therefore, only in so far as the Emperor himself willed to do so. Then coming to the provisions of this instrument itself, we find that the tenure of the Emperor is primogeniture in the male line of his family by agnatic succession; that his term is eternal; that his person is holy and inviolable; that he is the head of the state and exercises the sovereign power; that the Constitution can be amended only upon his proposition; that he has not only the usual executive powers of commanding the Army and Navy, appointing and dismissing all the civil and military officials, supervising the execution of the laws, granting reprieves and pardons, and sending and receiving Ambassadors, other public Ministers and Consuls, but has, also, the power to fix the war and peace footing of the Army and Navy, their organization and the salaries of all officials both military and civil, the power to declare war, make peace, and conclude treaties and agreements with foreign states, the power to declare the Empire in a state of siege and suspend all the rights of the subjects during such period, the power to call, open, adjourn, and prorogue the Legislature and dissolve the Lower House thereof, the power to appoint the presiding officers of the two legislative bodies, the House of Lords and the House of Deputies, the power to virtually constitute the House of Lords; also the power to initiate legislation and to veto all projects of legislation coming to him from the legislative bodies absolutely, the power not only to make the ordinances for the administration of the laws, but to make ordinances which shall have the force of law, in case the Legislature is not in session and when he shall

deem it necessary to the public security or the public welfare, and finally the power to control the expenditures incurred in the exercise of his sovereign rights, and in respect to all appropriations made by law, and to all obligations binding upon the Government, and to put the budget of the preceding year in force in case the Legislature should refuse to vote the budget for the current year.

These powers of the Emperor certainly make the Legislature virtually a debating society, despite the fact that the members of the Chamber of Deputies are elected by the male subjects twenty-five years of age and paying about seven dollars a year taxes. In fact the Constitution declares outright that the Emperor exercises the legislative power with the approval of the Chambers. The only limitation which the Legislature can impose upon the absoluteness of the Imperial prerogative is to prevent the enactment of any new statute. But this is a limitation more apparent than real, since the Emperor can govern perfectly well with the existing law, all of which was edicted by him or passed with his approval, or by means of ordinances supplementing the same.

And when we come to the most important test of the character of a Constitution, viz.: the relation of the Government to the individual citizen or subject, we do not find in the Japanese instrument any limitations upon the powers of Government in behalf of Individual Liberty which do not largely disappear upon close examination. The Constitution contains indeed an entire section devoted to this subject, which looks at first view like the usual Bill of Rights, guaranteeing freedom from arbitrary arrest, imprisonment, trial, and condemnation, from domiciliary search, from censorship over opinion and its expression, from interference with unions and assemblies, also, guar-

anteeing freedom of religion, of sojourn and domicile, of petition to the Government for redress of grievances, and the security of private property. But, when we scrutinize these provisions critically, we find, first, that they carefully declare the Japanese people to be subjects not citizens, and nullify, practically, all of these guarantees by declaring them valid only within legal limits, that is, within the limits prescribed by the Emperor alone before the Constitution was declared in force, or by the Emperor with the consent of the Legislature, or by the Emperor by virtue of his ordinance power reserved in the Constitution.

Moreover, the Judicial branch is constituted by ordinary statute and can, of course, be abolished in the same way, and although the Judges are appointed nominally for life they can be deposed by a disciplinary proceeding fixed by ordinary statute. Finally, there is not the shadow of a power vested in the Judiciary to defend the constitutional Immunities of the Individual against the acts of the Legislature, or indeed of the Emperor. If any controversy arises between an individual and an official it goes before the Administrative Courts, which are subject to the will of the Emperor.

The Japanese are organized under this Constitution for the exercise of strong military power, for presenting united front against foreign Powers and for restraining internal disorder, but it sacrifices Liberty to Government again and makes but little advance over the other Asiatic states in the maintenance of both Liberty and Government, and the harmonizing of both in a maturely developed political system of a superior order.

The history and present political status of Persia is another example of the inability of Asia to solve our problem,

while giving evidence of some consciousness of its existence and of some yearning for the conditions which its solution would bring.

We do not need to waste our time and energy upon the history of ancient Iran, because, in the first place, we do not possess exact knowledge enough about it, and because, in the second place, we are bound to conclude from what we do know that, in its political system, Liberty was completely sacrificed to Government, and that its political system was the usual Asiatic governmental despotism.

First with the conquest of Persia by the Arabs and the introduction of Mohammedanism, in the seventh century of the Christian era, do we come upon anything in Persian political history which bears upon our subject. The organization of the Arabian tribes into the Mohammedan state of Medina, then of Damascus, and then of Bagdad is the great political fact of southwestern Asiatic history from the seventh century to the rise of the Turks in the twelfth century. The Koran and Multeka of Mahomet contain in their spirit and provisions a certain limitation upon despotic governmental power, which lifts the political system subject to them up to a higher plane of civilization.

Mahomet, born in the latter part of the sixth century in Mecca, found Arabia in the condition of tribal Government, and tribal independence, according to which the bond of blood was the principle of political organization and the country was torn and bleeding by the dissensions of these petty states, if such organizations can be dignified by the name of states. Moved by the misery thus produced he evolved and taught the doctrine of the oneness of God and the equality of men. When I say he evolved this doctrine I do not mean originated it for the world, but only for the situation of southwestern Asia in the

seventh century. Upon the basis of it he erected what we may call the democratic state of Medina, and began the work of dissolving the tribal organizations and subjecting their elements to the new political principle of the Koran.

There can be no question that here was a great advance in political civilization and in general civilization. It produced two great states of the world, which have endured to the present day, viz.: Persia and Turkey, and I can see no other explanation for their continued existence, and their superior civilization to the unlimited despotisms which have risen and fallen in Asia, except the religious, moral, and civil limitations placed by the Koran and Multeka, and by the priesthood which have upheld them, upon governmental power and upon the tendency of an unchecked Government to degenerate into despotism. No unprejudiced scientific mind can fail to see in the religion of Mahomet a vast advance over the polytheism of his time and region, in the morals of Mahomet over the barbarous and degraded customs of his age, and in the laws of Mahomet over the bloody strife and anarchy which universally prevailed. Even the condition of woman, usually regarded now as the most vulnerable point in the Mohammedan system, was vastly improved over what then obtained.

The political history of Persia from the time of its conquest by the followers of the Prophet and the introduction of his system down to the year 1905 is the history of a change of dynasties rather than of a change of systems. The system had, however, a certain development. At first the Caliph was both the temporal and spiritual head of the state and people. Then, as the priesthood gradually developed and became organized, the final interpretations of the Koran and Multeka were assumed by them,

and finally the supreme power of interpretation of the principles of Mohammedanism was recognized as centring in the Mujtahid, or chief priest, of Kerbela. For centuries the Caliph or Shah of Persia has had no voice in the appointment of this chief priest. He is either chosen by the Ulemas or arrives at his office by a sort of natural selection, by a general recognition of his superior ability to interpret rightly the principles of Mohammedanism. The independent position of the Mujtahid of Kerbela has been a real limitation upon governmental absolutism. The Shah has been the sole Government, but has been obliged to govern within the lines of the Koran and Multeka as interpreted finally by the chief priest. Here was a real contribution to the solution of the great problem of the reconciliation of Government with Liberty. The entire priestly organization defended a certain sphere of Individual Immunity against the autocracy of the Shah. Here was the possibility of a continuous political civilization. Fatefully, I will not say unfortunately or fortunately, for I know not which, for Persia, no Mujtahid of Kerbela has existed since the year 1895, but a long struggle not yet ended, over the great position has helped to plunge the unhappy land into confusion and anarchy.

At the same time the increasing contact with Europeans and with Western civilization has undermined the influence of the Mohammedan religion over the Persian people and the competition between Russia and Great Britain for the superior control has complicated the situation and demoralized the people still further.

In 1905 the popular demand for a Representative Government arose and could not be suppressed. In 1906 the Shah announced his consent to the establishment of a National Council elected by the descendants of the Royal

House, the members of the Kajar families, to which tribe the Royal House originally belonged, the priests, the landowners, merchants, and tradesmen. In the autumn of this same year the members of this Council were elected and assembled, and the Shah signed formally the Constitution, which contained the authority for the existence and powers of the Council as well as the other parts of the Government, and took the oath upon the Constitution in the presence of the Council. In June of 1908, taking advantage of dissensions in the Council, the Shah dissolved it, and, by a decree, abolished it and with it the Constitution. This precipitated the revolution of 1909 to which the Shah surrendered and abdicated.

The Revolutionists restored the Constitution of 1906, elected the Vali-Ahd Shah and, also, the members of a new Council or Parliament. The Constitution, with the modifications introduced by the Revolutionists, although it contains something in the nature of a Bill of Rights, virtually vests all power, sovereignty, in the Government. The limitations imposed by the principles of Mohammedanism in behalf of the subject are swept away. The Mohammedan religion itself is passing, and nothing in the way of a maker of character and conscience is taking its place. The police power of the Government is to be its substitute until Great Britain and Russia see fit to make out of their spheres of influence territorial annexations. Again we are discomfited in our attempt to find any real contribution to the solution of our problem.

Finally we come to the Ottoman Empire, a state which once reached magnificent proportions territorially and which more than once appeared capable of a political development of a high order.

It was somewhere during the first half of the thirteenth century that a tribe of some four hundred families led by its chief, one Suleyman, left its home in Khorassan, in Central Asia, being crowded upon by a Mongol horde of marauders, and trekked westward into Asia Minor. It settled in a valley near the Eastern frontier of the East Roman Empire and came into contact with the Mohammedan rulers in that section. Almost immediately its members embraced Mohammedanism, and by the beginning of the fourteenth century, under its chief Othman or Osman, it had entered upon its eventful career in civilization.

It is not necessary to the subject of this book to enter upon the history of its conquests for the next two and a half centuries, through which it became the leading power of Asia and almost also of Europe, reaching from beyond the Tigris in Asia to the Danube in Europe and to the confines of Morocco in Africa. The things which chiefly concern us in this treatise is that this great Empire was from the first and continued to be, down to the most modern period of history, moulded by the principles of Mohammedanism and owed its great success and its continued existence to this fact rather than to anything else and everything else. The Osmanli embraced freely the Mohammedan religion, and the Government of their Sultan was developed under its influences and its limitations from the very first period of their settlement in Asia Minor.

As we have seen in another connection, the political result of the adoption of this religion was the breaking down of the tribal lines as political divisions and the substitution therefor of the idea of the unity of all believers in Allah in one holy state, subject to Government according to the principles of the Koran and Multeka. The Osmanli found

the inhabitants of Asia Minor and of Asia generally, as far as to the confines of India, already prepared for the recognition of a state upon their basis. They carried their authority and their religion into Europe, on the other hand, solely by the power of the sword, and sought to substitute them there for a civilization both religious and political of a higher character than their own.

The theory of the Ottoman system was, at least from the beginning of the fourteenth century, the autocracy of the Sultan as both Padishah and Caliph, that is, as both temporal and spiritual ruler; but there soon developed a powerful priesthood, the Ulemas, under the leadership of the Sheikh ul Islam, which claimed the ultimate interpretation of the Koran and Multeka and maintained this vast power upheld by the mass of believers, in other words, by the people. This was a democratic power, so to speak, organized in this powerful priestly corporation, which kept the Sultan within rational limitations and maintained a certain sphere of Liberty and even-handed justice for the subjects of his Government. The early Sultans were men of great ability and of austere virtue. They lived themselves in accordance with the strict rule of the Mohammedan religion and ethics.

It was only after they came into contact with the civilization of the East Roman Empire that the bonds of their own religion began to loosen and the consequent demoralization to manifest itself. The transformation of the military system and the establishment of the Harem followed quickly upon the invasion of Europe. The Osmanli, whose religious fanaticism had carried the power of the Sultan thus far, were superseded by the Janizaries, a new standing Army recruited from among the vanquished Christians. Without any religious or moral principle to nerve their

arms, in the first place, or curb their passions, in the second, they became a terrible soldatesca, who carried terror with them in their conquests, and then laid their will upon the cowering Sultans dawdling in the Harem with the women. They actually made and unmade Sultans and scandalized the Mohammedan religion and morals. The Sultans tried again and again to reorganize their Osmanli subjects in military power, but it was the first quarter of the nineteenth century before they finally succeeded, and by that time the Ottoman Empire was already in decadence.

From the period of the Greek rebellion, in the third decade of the last century, onward the Ottoman Empire has been driven step by step from Europe and Africa and seems soon destined to be confined to Asia. Its contact with Europe, however, has, as I have said, demoralized its people and its Government.

It began in 1876, in seeming good earnest, the work of Europeanizing its political system, all unmindful that, while the European system is a great advance in political civilization over the original system of the Ottoman Empire, it cannot be grafted on a Mohammedan religious and ethical system without demoralization in both directions. In December of 1876, when called upon to face the demands of Europe in regard to the treatment of his European and Christian subjects, the Sultan proclaimed a Constitution, fashioned after the European model. He seemed to prefer this to a treaty with those Powers upon this point. He could withdraw his Constitution at pleasure, but he could not withdraw from the obligations of a treaty so easily. The European Powers paid no attention to this Constitution, but, by the resolutions of the Congress of Berlin of 1878, imposed upon the Ottoman Empire its own terms. The Sultan, after this, seemed to feel no further obligation

to observe the Constitution and from 1878 on suspended its operation.

For thirty years more the demoralization of the Mohammedan system continued. The Sheikh ul Islam and the Ulemas, as the final interpreters and teachers of the system of the Koran and the Multeka, lost largely their control both of the Government and of the conscience of the subjects. While the Government was growing thus more absolute on the one side, revolution was in fomentation on the other.

At length, in the year 1908, what is called the young Turkish party forced the restoration of the Constitution of 1876, with an important addition concerning Civil Rights, and in 1909 the abdication of Abdul Hamid II. They elevated Mohammed V to the throne and resumed the task of transforming the system of the Ottoman Empire into that of the European state. The Constitution is rather a Charter issued by the Sultan than an organic law adopted by the people. In it the Sultan is sovereign and can, therefore, change it or withdraw it as he will. In it the governmental prerogatives of the Sultan are declared to be the power to appoint and dismiss the Ministers of State, to confer office, rank, honors, and decorations, to invest with office the Governors of the self-governing or privileged provinces, to coin money, to conclude treaties with foreign states, to declare war and make peace, to command the Army and Navy, to issue edicts and ordinances for the administration of the law, to reprieve and pardon, to administer justice according to the principles of the Koran and the Multeka, to call, open, and prorogue the Parliament, to appoint the Senators for life terms, and to dissolve the Lower House of Parliament, and to appoint and invest with power the presiding officers of both Houses, to initiate

exclusively legislation through his Ministers, to veto all bills and resolutions of the Legislature, and to promulgate and execute the laws. The participation of the people in the Government is to be seen only in their right to elect the members of the Lower House of Parliament and in the power of this House to prevent the passage of any new law or the repeal of any old law and to defeat, in whole or in part, the adoption of the budget. Inasmuch, however, as, according to other provisions of the Constitution, the Sultan's ordinances take the place of Parliamentary Acts, when the Parliament is not in session, a situation which the Sultan can control by using his prerogative of dissolving the Lower House, and the Sultan's edict may, when Parliament does not adopt the budget, authorize the continuance of the budget of the preceding year, and the laws in existence at the time of the promulgation of the Constitution which do not conflict with any provision thereof are declared by the Constitution as continuing in force, this power of the Parliament to prevent the enactment of new laws or the repeal or modification of old laws is largely illusory.

The point, however, of special importance to us in the inquiry is as to the power of the Government over the Immunities of the Individual. The Ottoman Constitution contains the usual Bill of Rights of the modern European Constitutions, which provides freedom of religion, freedom of speech and of the press and of instruction, liberty of the person within the legal limits, security of property within the legal limits, inviolability of the home, freedom of association and of petition, and the equal protection of the laws. It furthermore provides that the interpretation of the law relating to the administration of justice falls, in last instance, under the authority of the

regular Court of Cassation, that the interpretation of administrative law, *i. e.*, the law regulating the relations between the officials of the Government and the subjects of the Sultan, falls, in last instance, under the authority of the Privy Council of the Sultan, and that the interpretation of the Constitution falls, in last instance, under the authority of the Senate. Now the members of the Senate are appointed by the Sultan, with life terms; likewise the Judges of the Court of Cassation and of all the Courts, with life terms; while the Privy Council is both as to the appointment and dismissal of its members completely subject to the will of the Sultan. In the administration of justice between individuals, subjects of the Sultan, no matter what their religion or race, the independent Judiciary has the final word and must, by the command of the Constitution, accord the equal protection of the laws, but when it comes to the crucial point, the relation of the Government to the individual subject, then we see the Liberty of the subject subordinated entirely to the Government, and indeed to the Executive branch of the Government.

It is true that the Constitution declares, that in constitutional questions the power of final interpretation shall be exercised by the Senate and the members of the Senate are appointed by the Sultan for life, as are the Judges of the Courts. It appears, therefore, as if the Senate occupies a position of equal independence with that of the Courts, and might be relied upon to declare a statute or any provision, even though found in the Koran or the Multeka, null and void when in its opinion it shall conflict with any provisions of the Constitution. It must, however, be remembered that, as to new statutes passed under the present Constitution, the Senate would have

been participant in the enactment of the same and would not, therefore, be an impartial judge in their interpretation, when called in question by an individual on the claim that they contravene his constitutional immunities. Moreover, the only process provided whereby an individual could bring such a question before the Senate is petition, a very poor substitute for a regular judicial proceeding, and finally the Senate does not possess any machinery for executing its decisions against the Executive Government in behalf of the Immunities of the Individual from governmental power. The constitutional provisions appear, thus, largely illusory upon this most important question. In fact, they seem only to have done away with the ancient limitations of the Koran and the Multeka, interpreted by the independent authority of the Ulemas, upon autocratic power.

To the genius of Asia, the solution of the problem of the reconciliation of Government and Liberty is clearly extremely difficult, not to say impossible from a purely secular point of view. In Asia nothing but a religion, or, at least, a universally accepted ethical system, interpreted authoritatively by a priesthood or a learned class, has seemed able to place any limitations upon the Asiatic tendency to despotism in Government; and when the Asiatic states thus constituted come into contact with European political civilization the only effect, from this point of view, seems to be to free Government from the limitations of these religions, or quasi-religions, without finding anything of a secular legal character to substitute for them. In other words, the attempt to graft a European governmental system upon a Mohammedan or Confucian population seems to have for its results the establishment of a secular despotism and the destruction of the national

religion or the national morals, and this is nothing more nor less than the substitution in greater or less degree of the police powers of the Government for the religious or ethical conscience of the subjects.

CHAPTER II

THE EFFORT OF AFRICA

If Asia has done little toward the solution of the great problem, Africa has done next to nothing. Upon the vast African Continent of twelve million square miles of territory, inhabited by one hundred and fifty millions of people, only three small countries containing altogether less than five hundred thousand square miles of territory, inhabited by less than fifteen millions of people, can be in any sense called independent and sovereign states, and they cannot in any full and sufficient sense. They are Abyssinia, Liberia, and Morocco.

The first is, in some degree at least, under the joint protectorate of Great Britain, France, and Italy. The second is a protégé of the United States, and the third is under the protectorate of France and Spain or rather now of France in reference to the maintenance of the public peace and order.

Ten millions of square miles of the African Continent are in the possession of the European states as Colonies or Dependencies, and about one million five hundred thousand square miles are either without any population or are inhabited by beings in a condition of barbaric anarchy.

Of the three countries which I have mentioned as quasi-sovereign states, one, Liberia, may be left out of consideration, since it is composed chiefly of negroes transported from the United States of America and their descendants, has had its political Constitution made for it by the Gov-

ernment of the United States, and as a state is only a feeble copy of its great model. In other words, Liberia has done nothing of itself toward the solution of the problem of the reconciliation of Government and Liberty. We will confine our attention then to the other two.

The Abyssinian Empire is one of the oldest states of the world. It was ancient Ethiopia and had once for its ruler the famous Queen of Sheba. Its inhabitants were converted to Christianity in the first half of the fourth century, and have from that day to this considered themselves subject to the patriarchate of Alexandria. At present it occupies chiefly the mountain plateau of Eastern Africa, with an area of some two hundred thousand square miles of fertile soil, under a salubrious climate, occupied by about ten millions of inhabitants. Some of the conditions, at least, favorable to the creation of a civilized state are to be found here. Little advantage, however, seems to have been taken of them.

We know a little of the activities of the people in these regions down to the seventh or eighth centuries, and after that for a thousand years Ethiopian darkness settled over them. When they emerged again into the light of history, in the middle of the nineteenth century, we find as political institutions, first, the Emperor, or Negus, the owner, in theory, of the entire territory, and the unlimited Sovereign over the inhabitants of it, but, in fact, living in strict retirement in his Imperial abode, exercising almost no governmental power; second, the Rases, the feudal Lords of the provinces which had been conferred in fief upon them by the Emperor, exercising, in fact, unlimited powers over the inhabitants of their respective provinces, and paying the Emperor a small tribute and furnishing him a small contingent of armed men; and, thirdly, a very numerous

priestly class, well organized, under the immediate control of a native Ecclesiastic and the superior control of the Christian High Priest at Alexandria, or Cairo, and exercising vast influence, religious and educational, over the people.

Contact with the outer world had the usual result of strengthening the central power over against the local. The European states recognized only the authority of the Emperor, and the Emperors Theodore Johannes and Menelek brought the feudal Lords under greater subordination and created several new instruments of Government. The first was an Army of Mercenaries in place of, or rather alongside of, the feudal militia; the second was a Ministry of five Secretaries, Foreign Affairs, Finance, War, Justice, and Commerce; and the third, a Privy Council composed of the officials of the Palace and the Rases, or feudal Lords. The absolute and unlimited power of the Emperor in all respects is now in course of re-establishment through these means.

The one institution which is able to impose limitations on the power of the Emperor or that of the feudal Lords is the priestly organization. This is said to consist of nearly one hundred thousand persons. They are the wise men and as such are respected and revered by the people. They wield an influence which can neither be ignored nor disregarded. For sometime now they have been sustaining the Emperor against the feudal Lords. The recent attempt of the Emperor Menelek, however, to secularize education, raised up hostility which may greatly hinder the development of the central authority. It was ill-timed. For a long time still to come the control of education by the Clergy, the Christian Clergy, will be for the welfare of the Empire. If the Emperor should succeed in taking this out

of their hands and placing it in the hands of his own appointees, it is easy to see that the coming generations may be and probably will be educated out of the idea that the Christian priesthood are authorized to limit the Emperor's sovereignty and Government by the rule of Christian morals interpreted by them. The autocracy of the Emperor over the priesthood would signify the complete despotism of the Emperor both in theory and practise over every subject.

In Morocco, we reach the purest type now extant of the Mohammedan state. The Sultans of Morocco claim to be, and are regarded as being, the descendants of the Prophet himself. They regard themselves as possessing both the spiritual and secular power, that is, complete sovereignty, and such is the accepted theory of this system. Nevertheless, there are, in practise, limitations upon their power, which give the subject a living chance. In the first place they must create and maintain the physical means for the realization of their claimed authority. This necessitates concessions, at least, to a certain part of the subjects. In theory, the Moroccoan state is the community of believers in the Koran and their Caliph is sovereign. In fact, the Sultans have created a ruling class within the community of believers, consisting of his appointed agents at the Court and in the localities, his mercenary soldiers, and those upon whom he or his predecessors have conferred landed property in the form of fief. This body of men constitute the physical force through which the Sultan realizes his power and this power extends really only so far territorially as they are able to enforce it. In order to secure the loyalty and services of these men, the Sultan frees them from taxation and pays most of them a sort of salary or wage besides. It is from this body also that he

takes his governmental agents, and it is this body which really exercises the reserved power of the community of believers whenever it comes to such action. This body, therefore, may, if it will, curb the despotic power of the Sultan, as well as maintain it, over the common subject.

Then there exists the College of Ulemas at Fez, which claims the authority of ultimate interpretation of the Koran, the precepts of which the Sultans must follow in the exercise of their authority. This is the general principle of the Mohammedan state wherever it has existed or still exists. According to the Moroccoan system the will of the Sultan in legislation, administration, and judicial action is supreme, and all of his decrees and decisions are law, but if he ventures to violate or disregard the prescripts of the Koran, as interpreted by the College of Ulemas at Fez, then this body claims the power—and this power is accorded to it by the common tradition of the community of believers in the Koran—of admonishing the Sultan and, in case the violation be in its opinion flagrant and intolerable and the admonition be disregarded, of absolving the community of believers from its loyalty to the Sultan and authorizing the community to dethrone the Sultan; and since this reserved sovereignty of the community of believers has been in practise usurped, so to speak, by the ruling class, the composition of which has been already described, the power of dethroning the Sultan on account of what we would call unconstitutional action as determined by the College of Ulemas may be exercised by what we may call the Imperial Council of officials and vassals. It is indeed true that the Sultan may, in collusion with the College of Ulemas, really violate the principles of the Koran defensive of the Liberty of his subjects, and rule despotically, since this College is considered

as having the sole power of determining ultimately whether the acts and commands of the Sultan are violative of the higher law of the Koran or not; but, again, the Ulemas are independent of the Sultan in their tenures and they and their predecessors have built up a tradition in their interpretation of the Koran, a tradition known to the community of believers, and they are themselves limited by the same in practise, if not in theory. Historically, the voice of the Ulemas is sometimes low and pleading as for mercy, and often not heard at all, but again it is stern and commanding, and the Sultans have yielded to it. Also, the Sultans often consult the College of Ulemas when on the point of undertaking something questionable from the point of view of the higher law and generally, in such cases, follow their opinion.

Turn in whatever direction we may, we find the theoretical despotism of the Sultans of Morocco working under very substantial limitations in behalf of the Liberty of the subject. There is a higher law than the will of the Sultan, viz.: the Koran; and there is a body of wise men, independent of the Sultan in their position, who have the power of ultimate interpretation of the prescripts of the Koran, even against the Sultan himself, and the power to enforce their interpretations, finally, against him by authorizing the community of believers to dethrone him. It is to be apprehended that the introduction of European methods and influence, now in process, will modify this system and, while it may bring more security to Christians, will accord less of Liberty to the believers in Islam.

It will thus be seen that the effort of both Asia and Africa to solve the great problem of the reconciliation of Government and Liberty has manifested itself more clearly in the Mohammedan states than elsewhere. Had the sub-

jects of these states been wholly Mohammedans by their own choice and conviction it is not impossible that these states may have gone much further in this great work than they have. It is just their determination to extend the rule of their faith by the sword of the Prophet which has done more than anything else to hinder their progress in this most fundamental direction. Unlimited despotism over the non-Mohammedan subject tends to the establishment of the same sort of rule over the Mohammedan subject. This is one of the oldest experiences of practical politics. It was not necessary that the Mohammedan Governments should deny to their non-Mohammedan subjects the same Liberty granted to their Mohammedan subjects, although it is easily conceivable that their religious fanaticism led them into this vicious course. The Mohammedan system contained the elements for considerable development in the general direction of modern political progress. Briefly these elements were, first, the sovereignty of the community of believers; second, the interpretation of the principles of the Koran by the Ulemas; and third, Government by the Sultan or Shah. If some modern statesman could have given these a secular turn, it would not have been a far call to real modern constitutional Government and a better reconciliation of Government and Liberty. Let us hope that when the Turks return to their Asiatic home, with the experience of their European sojourn, such a statesman may rise among them and make their state the light of Western Asia.

BOOK II

THE EFFORT OF EUROPE

CHAPTER I

ANCIENT GREECE

The publicists almost universally claim that real political science begins with the Greeks, and that with the Greeks self-conscious man first attains political as well as philosophical and artistic development. The Greeks, they claim, first founded the state upon human nature and made of it an entirely human institution. Plato defines it to be the highest revelation of human virtue, the perfection of mankind. Aristotle also calls man a political being and defines the state as the community of its citizens in the work of perfecting human existence; founded first for the security of human life, it becomes finally the great organ of human welfare. We would naturally expect that, with such development of political thought, a system of practical politics ought to have been established, which would have gone far in solving the great problem of the reconciliation of Government and Liberty, but a careful and critical study of the political history of the Greeks does not reveal anything very satisfactory in this respect. The Greeks, as all the peoples of antiquity, confounded the state with the Government and, because they recognized the state as sovereign, made Government almighty. In other words, they

recognized in their political science or in their practical politics no sphere of Individual Immunity against governmental power. Consequently they did not even recognize with any clearness of consciousness the problem of the reconciliation of Government and Liberty. Nevertheless, the careful student cannot fail to discern in the investigation of their institutions a feeling of the existence of this great problem and a groping after its solution.

Ancient Greece, as every one knows, was, until the period of the Macedonian supremacy, in the middle of the third century before the Christian era, more a geographical than a political term. Territorial Greece was, in antiquity, the home of a number of independent states, sometimes in partial confederation, sometimes not. These states the political historians generally classify according to two models, the one Sparta and the other Athens, the one class comprehending what they term the oligarchies, the other the democracies. Without adopting either the nomenclature or the conclusions of these historians we may accept their proposition far enough to justify us in confining our attention to these two states in our search for any evidences of the consciousness of the problem of the reconciliation of Government and Liberty and for any attempt to solve it.

More than a thousand years before the beginning of the Christian era a migration of tribes in military organization from the southern spurs of the Balkans into the middle and southern portions of the Greek peninsula seems to have taken place, similar in many respects to the Teutonic migrations into the Italian peninsula nearly fifteen hundred years later. They came, that is, under the sole and unlimited command or Government of the military Chief, the leader, chosen by them in some rude way, of the migration.

Such a band of people called Dorians penetrated into the lower end of the peninsula, into the rich valley of Lacedæmon, and there under the shadow of Mount Taggetus, on the bank of the Eurotas, built their huts or rather pitched their camp, out of which was developed the city and state of Sparta.

The Dorians displaced a preceding population, driving some of them back upon the less fertile tablelands which rose out of the valley, or subjecting them as peasants and slaves to work the soil occupied by themselves or to do the menial service of the household. These movements determined the social character of the Spartan Commonwealth. First there was the conquering race, then the free farmers on the plateaus, and lastly the peasants and slaves. Only the first class constituted the political people and, as we have said, they were organized about their military Chieftain and subject to his unlimited command. Of course, so soon as the Dorians went over to the pursuits of peace the military organization would soon be felt to be unnatural and unbearable and limitations upon it would be demanded, if it should not be wholly set aside.

The reorganization came somewhere about the middle of the ninth century before Christ and is connected with the name of Lycurgus. This Lycurgan Constitution contained three chief provisions. First, it left the military Commander, the Duke, as Governor in peace, as King with a life term, and with a tenure which probably contained both the elements of hereditary right and that of election by the "Gervasia," the Senate of Elders. Secondly, it constructed a Senate of the house fathers, the heads of families of the ruling race, and an Assembly of all male adult Dorians. The King was still Commander-in-Chief, but was recognized as the administrator of law and justice

personally, and through his own appointed agents, while the Senate, with the approval of the Assembly, exercised in an illy defined way what we may call the legislative power, and the power, under certain limitations, of electing the King.

The part of this Constitution, however, pertinent and important to our inquiry was the College of Ephors, or overseers. Unquestionably, the purpose of this institution was to hold the Government in all its activities within the limits of ancient custom. The College consisted of five persons chosen by the Assembly upon nomination by the Senate, *i. e.*, practically chosen by the Senate, and all officials of the Government both civil and military, even the King or Kings—for there were two members of the Royal House considered as ruling at the same time—were subject to their control. This practice of having two Kings in Sparta at the same time was maintained probably for the purpose of hindering the extreme development of autocracy, but it was the College of Ephors which was consciously designed to hold the Government within the bounds of constitutional limitations and prevent its becoming completely despotic.

Here was certainly an early effort to reconcile Government with Liberty, with Liberty as expressed in ancient custom, *i. e.*, as expressed in folk custom, popular custom. The Ephors were probably selected for their knowledge of this custom and they were furnished with practically unlimited authority to uphold it. It was certainly a dangerous pinnacle of power upon which they stood. Had they confined themselves to the task of protecting the individual citizen of Sparta against the encroachments of Government upon his sphere of customary Liberty, the development of the Lycurgan Constitution might have

proceeded very far and have reached a high degree of political civilization. But it is hardly to be expected that they should have been able to make such fine distinctions. With the unlimited power of control over all governmental action, it is quite conceivable how, with the most honest and honorable intentions, they, regarding themselves as the representatives of the people, should be, it may have been quite unconsciously, betrayed into usurpations of the powers of the Government, until they should practically establish an oligarchy of the most despotic character, since no constitutional check upon them had been created. This was exactly what happened. Instead of being, as was originally intended, simply a check upon Government in behalf of customary rights, this College or Board of Ephors became in fact the Supreme Government of the state and reduced all other parts of the Government to the position either of agents of its will or ratifiers of its propositions. It was just as if the Supreme Court of the United States should ordain the enforcement of its interpretations of social conditions and requirements as law, as many of our advocates of so-called "Social Justice" are urging it to do, instead of adhering strictly to the interpretations of the law.

This advance of the College of Ephors from the position of a Board of Control to that of actual Government was, of course, very gradual and extended through a long period of time. For decades, yes for centuries, the Assembly of citizens was not conscious of it, but seemed to think that the Ephors were only representing the growing power of the citizens against the Kings and their Government. It was the Kings, if anybody, who were conscious of it, but their resistance to it seemed at first only to stiffen the support of the Assembly for these usurpations. It required

nearly five hundred years of this development to bring its real nature to general recognition. In the third century before the Christian era, King Cleomenes felt himself sufficiently sustained by what we may call general opinion to put the entire body of Ephors to the sword and abolish the institution.

With this event, the effort of Sparta to limit Government in behalf of Individual Liberty ceased altogether. The failure to solve this great problem was the beginning of the end, for although the despotic Government might for a time, and even in consequence of its despotic power, win victories over other states, yet the poison had entered into the veins and tissues of the Spartan Commonwealth and was bound in time to sap, first, the strength of the individual citizen and then that of the Commonwealth, which is only the totality of its individual members.

The Athenian state had a like origin and, as far as our problem is concerned, made a somewhat similar development. An Ionian tribe in military organization under the lead of a chosen Chief settled itself down upon a preceding population in the Attic plain, somewhere about one thousand years B. C. It subjected four-fifths of the existing population, at least, to slavery and drove the rest back upon the higher lands surrounding the plain. The rude huts of military occupation built by this tribe upon the plain developed into the City of Athens and the tribe itself into the Athenian Republic.

The first political change after the settlement was induced by the transition from a condition of war and migration to a condition of comparative peace. The members of the tribe in tribal assembly began to place limitations upon the power of the Chief, whose unlimited authority

as military Commander was soon felt not to comport with the new conditions of settlement and general peace. They first took away from the King his priestly functions and changed his title from Basileus to Archon to emphasize the fact that he was only the civil or secular ruler. They then changed his tenure from hereditary right to election and his term from one for life to one for ten years. Finally, they divided the Royal power among nine Archons, selected by them annually. The nine Archons wielded together the whole power of the state, and the sole defense of Liberty consisted in the fact that they did not act together as a Board or College or Ministry, but separately. Such separate action, however, threatened anarchy in the Government.

The Athenians were some four hundred years in accomplishing these results, when they seemed to become conscious that something must be done to overcome the disintegrating tendency of the nine-headed Government. They authorized one of their leading men, Draco, to codify the laws or customs for the guidance of the Archons and for the limitation of their discretion in Government. The Draconian code was not invented by Draco, and its severity cannot be attributed to him personally. He only gathered together in a compendium what already existed. One great step, however, was taken in connection with the promulgation of this code, whether originated by Draco or not. It was the establishment of a Court called the Ephetæ, separate from and independent of the Archons, and the investment of this body with supreme criminal jurisdiction.

These reforms, which took place somewhere about six hundred and twenty-five years before the Christian era, did not, however, prevent the rise of a demagogue upon the ground of the popular discontent, who made the at-

tempt to establish what we now call the Cæsaristic democracy, one Cylon. He failed, however, and the Athenian Nobles confided the cause of reform to one of their own number who had won already great reputation for himself as a man of judgment, impartiality, force, and patriotism, Solon.

The reform of the Athenian state by Solon, somewhere about six hundred years before the beginning of the Christian era, gave to the Republic its most substantial institutions. Passing by his economic and monetary arrangements, his political reforms consisted of four general creations or modifications of what already existed. The first was the classification of all Athenian citizens, *i. e.*, of all Athenians having any political rights, into four classes in accordance with the amount of taxes or contributions paid by them into the Treasury of the state, and confining eligibility to the Archonships to the first class and limiting the political privileges of the fourth class to voting in the Assembly. The second was the rejuvenation of the Assembly so that it became the real lawmaking power of the Republic and the source of the tenure of the Archons, as well as the supreme controlling body over their administration. The third was the creation of the Council of the Four Hundred, its members chosen annually by the Assembly, to prepare legislation for, and introduce it into, the Assembly. The fourth, and for our subject far the most important, was the transformation of the Court of the Ephetæ, called the Court of the Areopagus, by filling its seats with those outgoing Archons whose administration had been approved by the Assembly, and by conferring upon it a general power of censorship over the acts of the Government and a veto upon the laws which violated in their opinion ancient custom or sound morals.

Here was, again, quite a conscious effort to reconcile Government and Liberty, an effort which might have succeeded much better had the Court of the Areopagus confined its vetoes to laws and administrative acts contravening the customary Civil Liberty of the citizen and subject. So far as we know, it made no such sound distinction, and the Solonian Constitution did not last half a century before the cry was raised against it that it was plutocratic.

It was natural that this feeling should produce a demagogue and be taken advantage of by a demagogue. About 560 B. C. he appeared, Pisistratus, at the head of the Highlanders, the poorest of the citizens of Athens, and in a struggle of fifteen years he overthrew the Government under the Solonian Constitution, and for eighteen years, until his death, reigned and ruled as the Tyrant of Athens. The historians agree that he governed benevolently and beneficently. It was his son, Hippias, who succeeded him in 527 B. C., through whom the real nature of the tyranny, the democratic Cæsarism, came to full manifestation. The Spartan state, seeing its own demoralization in the triumph of this pseudodemocracy in Athens, now interfered and, in the year 510 B. C., or thereabout, drove the house of Pisistratus out of Athens.

In the struggle which now followed between the Nobles, the middle class, and the proletariat, the middle class, led by Clisthenes, won the day. The reforms now introduced by Clisthenes developed, according to the ideas of Herodotus, the genuine Athenian democracy. He abolished the social and political classification of Solon and divided the whole citizenship of Athens without regard either to birth, blood, or wealth into ten tribes upon a territorial basis. He increased the number of the Solonian Council

from four hundred to five hundred members, fifty being elected from and by each of the ten tribes. The Court of the Areopagus was left as before and, of course, the Archonship; but new popular Courts, consisting of citizens, were instituted, in which speedy and inexpensive justice in minor cases could be secured. Sparta again objected to this democratic development and King Cleomenes again invaded Attica and drove out Clisthenes and his following. Isagoras, the leader of the Aristocratic faction, was made Archon and many of the democratic leaders were banished. This provoked a popular insurrection, which momentarily restored Clisthenes, only to be driven out again by Cleomenes. By this time, however, the Spartan opposition to the democratic development in Athens had largely spent itself and Athens was left, at last, about 500 B. C., to follow its own course.

For the next twenty-five years the Republic was engaged in the great war with Persia, the influence of which over the internal situation was, as is practically always the case, the increase of the power of the Government at the expense of Individual Liberty; and the final triumph of the Greeks only increased this tendency. The services rendered by the lower classes, or rather poorer classes, of the Athenian citizens in this struggle led to the members of these classes being made eligible to the highest office in the Government, the Archonship, upon proposition of Aristides himself. Another important result of the change of spirit in the Athenian Republic brought about by the triumph over Persia was the haughty supremacy and domination which Athens now assumed over her confederates. The Delos Confederation, as the league between Athens and her Greek allies was termed, was transformed into the Athenian Empire by the exercise of military force,

and the independent Governments of these allies were reduced to dependencies of Athens.

This was the situation in Athens when Pericles came to the front as the leader of the democracy. His personality dominated nearly everything from the beginning of his career. He was a philosopher, an orator, a statesman, an astute politician, a great soldier, and a great patron of art all combined—the ideal Cæsar. He flattered the people. He distributed the public money among the poor. He introduced the system of paying for all official service, in order to enable the poorer classes to occupy office. Plato evidently regarded him as a first-class demagogue and as a corrupter of the Athenian people. Plato declares outright that he rendered them lazy, avaricious gossip-mongers. Early in his great career he attacked the Court of the Areopagus as an aristocratic institution, consisting as it did of the retiring Archons, after approved administrative activity, holding for life and exercising the power of controlling the administration of the Archons and vetoing legislation which in their opinion violated the customary Liberty of the people or sound morals. Through his impassioned appeals to the people against this great Court, Pericles finally succeeded, by popular support in the Assembly and out of it, in destroying these great conservative powers and in reducing this Court to a mere criminal tribunal. With this the great balance-wheel of the Athenian Constitution was discarded and personal Government ruled unhindered. Pericles himself exercised his vast despotic power with wisdom, success, and moderation, but he had no Pericles for his successor.

The death of Pericles, in 429 B. C., was in reality the close of the brilliant period in Greek history which bears his name. After him the despotism of the Government,

which he had established, continued unchecked and reduced the Athenian people more and more to the condition of idle, deceitful, self-respectless, gossiping paupers and beggars, and the great and promising effort of the Athenian state to solve the momentous problem of the reconciliation of Government and Liberty had exhausted itself permanently. I say the promising effort, because the Court of the Areopagus must be regarded as having been in its composition and powers better calculated to solve this problem than the Spartan College of Ephors. In the first place, its membership was larger and contained the best wisdom and experience of the Republic, the retiring Archons whose administrations had been approved by the Assembly and by public opinion; and, in the second place, it did not usurp governmental power itself, as did the College of Ephors, but confined itself to limiting the powers of Government by the rule of ancient custom and good morals. The imperfections in this order of things were that it did not provide for the development of, or changes in, ancient custom and made the Court of the Areopagus the supreme interpreter of morals as well as law. In other words, the powers of this Court as interpreter of the Constitution went too far, or perhaps it would be more intelligible to say that the Constitution was too uncertain, since it was in theory the code of morals and of customs of the Athenians. This uncertainty opened too wide a realm for interpretation by the Court of the Areopagus. It gave this Court really too much control over the development of law and custom, and the general consciousness of this situation which gradually developed enabled the skilful Pericles to create a powerful popular hostility to the Court, which finally deprived it of its power of limiting the actions of the Government within the bounds of good morals and

ancient custom. If the Athenian politics had provided a sovereign back of both the Court and the Government, which should have drawn and redrawn, from time to time, the line between the functions of the Government and the Liberties of the Individual, and have empowered the Court to hold each, by its interpretations, within its constitutional sphere, then might the Court have lived and maintained its great powers of constitutional interpretation and the Government have been restrained by it from becoming despotic. As it was, however, with the Athenian people acting immediately as the Legislature, a conflict between the Court and the Government could end only one way. The Athenian people could not distinguish between their sovereign act investing the Court with its wide powers of interpretation and their ordinary legislative act, but under the influence of the eloquent sophistry of Pericles came to view the functions of the Court as usurpations of a power over the people.

When, now, all the Greek states became, about four hundred and thirty years before the beginning of the Christian era, simply despotic Governments, *i. e.*, unlimited Governments, Governments which were sovereign over against the citizen and the subject, then the possibility in logical thought for the creation of a federal system of Government including all of the Greek states was destroyed, because for the establishment of such a system the organization of a National sovereignty back of, and supreme over, all these states was the prime necessity, which should have created a National Constitution of Government and Liberty and a central Government, and have distributed the powers of Government between the central Government and the original states. In the absence of such a conception in the system of each of the states, it could not exist for the or-

ganization of the Greek Nation. Consequently the only alternatives were that the Greek states should remain entirely independent of each other, or form interstate leagues or confederations, or that one of them should subject the others to itself and make them dependencies, or finally that a foreign power, both nationally and politically, should come in and establish its empire over them all.

Twenty-five years of struggle between Athens, Sparta, and Thebes for the ascendancy now followed with no constructive result; then sixty-five years of consequent exhaustion and indifference opened the way for the barbaric military Monarchy of Macedon to subject them all to its despotic rule, which expended itself and the whole political capacity of the Greeks during the next two centuries and made them all the prey of the foreigner. The political centre of Europe and the world had moved westward and was now constructing the system of the great World-Empire of Rome, and to that we must now look for further advancement toward the solution of the great problem of the reconciliation of Government and Liberty.

CHAPTER II

THE EFFORT OF ANCIENT ROME

The earliest political situation in Rome of which we have any credible historical account was one presenting as political institutions: first, the Kingship exercising all the powers of Government of whatever nature; second, the Senate of Elders, the heads of the leading families; and third, the Comitia Curiata. The Comitia Curiata was an assembly of all the members of the thirty curiæ of Rome. The curia was a body of territorial neighbors worshipping under a common priest and around a common hearth. Of course, only the freemen among these appeared as members of the Comitia Curiata. The functions of the Senate and the Comitia Curiata were not those of Government, but the prevention of arbitrary Government by the King and the election of the King. The Senate protected the rights and privileges of the Patrician class and the Comitia Curiata those of the common freemen. So long as the Senate and the Comitia Curiata did not participate in the Government, they constituted a check upon Government in behalf of Liberty which was decidedly effective. The Senate gave the King counsel, and he could make no law which was valid against the veto either of the Senate or of the Comitia Curiata.

Under this form Rome progressed for nearly two centuries, adding populations which were neither represented in the Senate nor in the Comitia Curiata, when the sixth King, Servius Tullius, added a new institution, first as a

new system of military organization, and then as a political organization. It was termed the Comitia Centuriata. Briefly it was constructed by dividing the entire arms-bearing population into centuries, *i. e.*, bodies of one hundred men, of which there were, at the time of Servius Tullius, some two hundred centuries or twenty thousand men. These centuries contained the whole population, Patrician as well as Plebeian, and were arranged, as to the order in which they stood and as to the arms they bore, according to their wealth and position in the society. As afterward assembled in the Comitia Centuriata they voted in a ratio depending on these same distinctions. The Senate and the Comitia Curiata were Patrician, being composed of the original families of the city, but the Comitia Centuriata contained all free Plebeians as well as the Patricians and the inhabitants of the country districts as well as of the city proper.

This new Comitia participated in the Government no further than did the Senate and the Comitia Curiata. It was simply a popular check upon the King's Government. It can hardly be considered as having been a genuine popular check since, as we have seen, it contained Patricians as well as Plebeians, and the Patricians had the greater weight in the determinations of the body. The King's Government was now held in check by the three bodies, the Senate, Comitia Curiata, and Comitia Centuriata, in all of which, however, the Patricians, the descendants of the families of the original settlers, held either the exclusive power or the balance of power.

Quite naturally the later Kings showed tendencies of favoring the Plebeians, not only from a sense of justice, but, also, for the political purpose of gaining the support of the Plebeians against the Patricians. When this ten-

dency became pronounced and persistent, the Patricians seized the first promising opportunity to abolish the Kingship and set up the Republic, *i. e.*, Government by the Senate and Comitiæ. Instead of the Senate and the Comitiæ being now checks upon Government in behalf of Liberty they became the Government, the whole Government, and the unlimited Government for the moment. Two Consuls, chosen annually by the Comitia Centuriata, from among the Patrician order, and ratified as to their choice by the Senate and the Comitia Curiata, were the executive power and as such not only executed the law, but appointed all the other officials, or Magistrates, as the officials were termed in the Roman law, the Senate and the Comitiæ making the law, in such form, however, and according to a procedure which made the Senate appear as the final sanction-giving body and the others as initiating or consenting bodies.

As I have said, the Patrician order dominated not only the Senate, but also the two Comitiæ, and the Plebeians very soon began to feel the necessity for a check upon Government by the Patrician order. The first recognition of, and concession to, their demand for such a check was in the form of a law, the Lex Valeria of the year 509, the first year of the Republic, which provided that no Magistrate should execute a capital sentence upon a Roman citizen until the same should have been ratified by the Comitia Centuriata.

But this was in two respects insufficient. First, the Patricians held the balance of power in the Comitia Centuriata, and, second, there was no power except that of the Patrician Consuls and their appointees to execute the law or the decisions of the Comitia. In order to remedy these defects the Plebeians took matters into their own hands.

In the year 493, on return from a victorious campaign, the Plebeian soldiery, the stock and stuff of the Army, withdrew from the city and occupied Mons Sacer, some three or four miles away, and threatened to frame there their own state and Government, if their demands should be disregarded. Under this pressure the Patricians gave way and agreed to the creation of Tribunes of the Plebeians, with the power of protecting a citizen against the arbitrary acts of any Magistrate. This concession is known in Roman history as the Lex Sacrata.

These Tribunes, at first only two in number and gradually increased during the next fifty years to ten, were not originally Magistrates or governmental officials. They simply interfered personally between a Magistrate and a citizen on application of the latter, and protected the citizen against the exercise of arbitrary power over him by a Magistrate; and by the *vetus jusjurandum*, the oath sworn between the Patrician class and the Plebeians in accordance with the Lex Sacrata, a curse of the Gods rested upon any violator of the person of a Tribune.

It was entirely natural, however, that the Tribunes themselves should seek to organize in their support some more reliable force than the curse of the Gods, especially when the interpretation of the will of the Gods was in the hands of Pontiffs and Augurs appointed by the Patrician Consuls from the Patrician class. The Tribunes soon began, therefore, to gather the Plebeians in assemblies, in what was termed in the Latin vernacular Conciliæ Plebis, and out of these Conciliæ Plebis was gradually developed the later powerful Comitia Tributa, with its power to limit the action of the Government in every direction, and to elect the Tribunes and vest them with the power of executing the decisions and resolutions of the Comitia Tributa.

By the law called the Lex Publilia of the year 471 B. C., this new institution was legally recognized as a part of the Roman Constitution.

There was still, however, a weak place in the Constitution: Who should say when a Magistrate was acting arbitrarily? If the Magistrate himself or the Senate or the Comitia Curiata or the Comitia Centuriata, where was the defense for the Plebeian? If the Tribune or the Comitia Tributa, where was the power of the Government? It was evident that the fundamental principles of Individual Immunity against governmental power must be agreed upon and reduced to a written form. Tribune Terentilius Arsa made this demand of the Government in the year 460 B. C. After ten years of struggle the Plebeians secured this, but were obliged to agree to having these fundamental principles formulated by ten Patricians instead of by ten Plebeians as Arsa had demanded. These ten Patricians, called in Roman history the first Decemvirate, were chosen by the Comitia Centuriata to govern absolutely for one year and at the same time to produce this Bill of Rights, so to speak. Their work is the document known in Roman history as "The Twelve Tables." Quite curiously and interestingly the provisions of these Twelve Tables may be distinguished under three heads: first, a sphere of individual self-help, or absolute Immunity from governmental power; second, the provisions fixing due process of law; and, third, those securing the equal protection of the laws. All these provisions became part of the Constitution in the usual way, viz.: by vote of the Comitiæ and the sanction of the Senate.

Here, then,was the most complete solution of the problem of the reconciliation of Government and Liberty which the world had down to that time produced, viz.: a written

Constitution of Individual Liberty and Immunity against governmental power and an organization, outside of the Government, of those to be protected in the enjoyment of such Liberty with the power in their own elected Tribunes to execute these provisions, according to their own interpretation, in behalf of the Individual against the Government. The danger, or perhaps we had better say the prospect, was now that the Tribunes would tie the Government down too tightly. The Patricians felt this and undertook to frustrate it by voting to continue the Decemvirate of Patricians, and brought on a struggle with the Plebeians for the restoration of the Consuls and the old order of Magistrates in which the Plebeians again won their contention.

By this time, about 450 B. C., through conquest, extension, and annexation, Rome had advanced its jurisdiction so far around the original city that there were, according to the Roman historians, some twenty-one tribes, in only four of which, the original ones, were there any considerable number of the Patrician order, if any at all. The seventeen newer tribes contained a vast Plebeian power, which now really held the fate of the Roman Republic in its hands. It is quite explicable that the Plebeians would not now be satisfied with the mere defense of their Civil Rights against the arbitrariness of Government, but would seek a full participation in Government itself. If they had been good political scientists they would have left their Comitia Tributa and their Tribunes independent of the responsibilities of Government, as constitutional protectors of Civil Liberty, and have sought to reform the Comitia Centuriata so as to have taken the balance of power therein from the Patricians, and would have demanded eligibility to all the offices. It is quite intelligible, however, that, in the absence of such scientific reasoning, and with the over-

whelming volume of physical power present in the Comitia Tributa, the Plebeian leaders should have sought to make this body and their chosen Tribunes parts of the Government.

The first success which they scored in this undertaking was to secure the recognition of the resolutions of their Comitia Tributa as being binding upon the Patricians as well as upon the Plebeians. The Patricians were able, however, at first to modify the effect of this by imposing the principle that the Senate must sanction the plebiscita, before they could be regarded as law. In other words, the Plebeians won, at first, only the right to initiate legislation through the Comitia Tributa. This came to pass about 449 or 448 B. C.

Then came the struggle over the eligibility of Plebeians for the Consulship. It was proposed first about the year 445 B. C., by Tribune Caius Canuleius. The Patricians sidetracked, so to speak, this proposition by enacting in the bodies controlled by them, viz.: the Senate, the Comitia Curiata, and the Comitia Centuriata, a law that for the next six years there should be, instead of the two Consuls as the chief Magistrates, six Military Tribunes with consular power, and that Plebeians should be eligible to these offices. The Plebeians accepted this substitution with a very bad grace, and while securing the election of members of their order to the Consular Tribuneships still struggled on for the restoration of the Consulship and the eligibility of Plebeians to the high office. For more than seventy-five years this conflict was waged when finally by the Lex Licinia of the year 367 B. C., or thereabout, the Plebeian contention became the constitutional law of the Republic.

Of course, with eligibility to the highest office conceded, that to all other Magistracies quickly followed. There re-

mained now only the work of freeing the resolutions of the Comitia Tributa from the necessary sanction of the Senate in order to become law, and the Republic would be triumphantly democratized. This required another seventy-five years of struggle. It was, however, bound to come, and after about 286 B. C. the plebiscita of the Comitia Tributa became law without the sanction of the Senate.

The Comitia Tributa and its Tribunes were now, however, parts of the Government. They had abandoned their high constitutional position of independent defenders of Civil Liberty against the encroachments and arbitrariness of the Government, and now again, consequently, the individual citizen or subject had nothing except the benevolence of Government to which to appeal for his protection. In the abandonment of its original position by the Comitia Tributa the ground was being prepared for Imperialism. With such a system of Government it was that Rome now entered upon the conquest of the world outside of Italy. For a hundred and twenty-five years after 265 B. C. she was engaged chiefly in this work, which extended her confines from the Euphrates on the East to the Atlantic Ocean on the West, and from the Danube on the North to the African Desert on the South.

The question which rises uppermost in the mind of every political scientist and practical statesman in contemplating this great fact is: How could Rome accomplish this stupendous task under a form of Government which was hardly fitted for a municipality of one hundred thousand inhabitants? With this system of divided authority between Patrician Senate and Plebeian Comitia Tributa, with no organized body to settle differences between them, and of double-headed Executive, how could the Government manage the problems of diplomacy, conquest, and

the control of allies and subjected peoples? The answer is that it simply did not do it. While no formal transformations took place in the customary Constitution, the working of the Government changed profoundly. In a word, the Senate became the whole Government practically, and the Magistrates and military Commanders became its agents. This was inevitable under the conditions of war and conquest. There must be some one central undisputed authority from which all Government should radiate to meet and solve the problems to which this condition gave rise. It could not be the Comitia Tributa. This body was so numerous and irregular and had so little consensus of opinion, if it had any opinion at all in regard to such problems, that Government by it was out of the question. It had never come into existence for any such purpose and could never fulfil any such purpose. The other two Comitiæ were controlled by the same class that composed the Senate, and, of course, this class would act through the body where it would find no obstacles. The Senate had been strengthened, too, after the admission of Plebeians to the Magistracies, by the custom of all Ex-Magistrates and their families being regarded as ennobled. This new nobility composed of the old Patrician families and this host of Ex-Magistrate families stood firmly behind the Senate and furnished the Senate with the best political and juristic talent which Rome afforded. The Senate now conducted the diplomacy and the relations with foreign Powers, made war and peace and all treaties, made the laws, managed the finances, and created and controlled a vast official service of Consuls, Proconsuls, Prætors, Prefects, and military Commanders throughout the immense territory whose populations now acknowledged the sway of Rome.

So long as the revel of world conquest went on the City of Rome grew in population and wealth almost without bounds or limits. The cheap food furnished by the Government and spectacles of sport, play, and triumphal processions drew the free farmers of the rural districts into the city and left the lands which had been their homes and support either to waste or to be absorbed in latifundia and worked, if worked at all, by freedmen and slaves. The self-respect and public spirit of the Plebeians were lost in the search for pleasure and in the dazzling circus of metropolitan life. For the moment Liberty had been swallowed up by the almighty Government, which pillaged the world and held the minds of men bedrunken and besotted with the delights of oriental luxury and vice.

But when this era closed and the enemies of Rome, who might be plundered at will, became the subjects of Rome, who must be allowed to live, the day of reckoning arrived. Men began to think whether the Liberties of the people and the Government of the vast state could be permanently left to this handful of Roman Nobles, however capable they may have proven themselves in the period of conquest. The more intelligent Plebeians and many of the fairer-minded Nobles became dismayed at the ruin of the agricultural interests of Italy and the herding of the country folk in the cities, and began the agitation for agrarian reforms. These propositions were, however, opposed by the Senate, and such opposition it was that precipitated again the constitutional question.

Tiberius Graccus, elected Tribune in the year 133 B. C., undertook to overcome the opposition of the Senate to his agrarian reforms by reasserting the power of the Comitia Tributa to make law without the sanction of the Senate and the power of the Tribunes to check the arbi-

trary rule of the Magistrates. His temerity cost him his life, but the word which he had spoken could not be recalled. Ten years later his brother Gaius revived the claims put forth by him and renewed the struggle, and from this moment onward the popular party formed itself around the Comitia Tributa and its Tribunes, and announced its determination of restoring this assembly and its chosen leaders to their predominant place in the Constitution. Gaius, like his brother Tiberius, fell by the dagger of the assassin, but ten years later the Plebeians found a still more powerful leader in Gaius Marius, a true son of the people, a great soldier, and an able administrator of affairs. The Plebeians succeeded in electing Marius to six or seven terms as Consul, and while they thus demoralized the system of elective office in the Republic, they did not succeed either with Marius or with the great Tribune, Marcus Livias Drusus, in triumphing decidedly over the Senate.

By the establishment of the Dictatorship of Sulla, in the year 81 B. C., and the suspension of all civil constitutional Government in behalf of a military autocracy, even though this was regarded as a temporary expedient, the Senate, on its side, dealt the Republic a blow which shattered its Constitution into fragments.

The only question now left was whether the Dictator would stand for, and as the representative of, the Senate and the municipality of Rome or for the Plebeians and the vast Empire which had been conquered and annexed. For nine or ten years, only, the Senate prolonged through this means its own ascendancy, when another successful soldier, Pompey, lent the aid of the legions under his command to restore the power of the Tribunes and the Comitia Tributa. With his troops and those under the command of his wealthy friend, Crassus, encamped just out-

side the city, he forced the election of himself and Crassus as Consuls and gave the direction for the development of the military Dictatorship toward the side of the Plebeians. The coalition of Pompey and Crassus with Cæsar in the year 60 B. C. brought at last the personality to the front who was destined to accomplish this result by his military triumphs in the provinces, followed by the march of his victorious and devoted legions to Rome and the subjection of the Senate to his will by military force.

It has been doubted by historians that Cæsar had in mind from the beginning the complete transformation of the Roman Constitution. He could hardly have proceeded with more precision and directness and consecutiveness had he followed a plan long and carefully matured. His elements of strength were his legions and the populace of Rome. He secured through the populace in the Comitiæ the permanent Dictatorship, a form of unlimited governmental power already known to the Constitution in the Sullan precedent. Upon the basis of this he reconstructed the Government outside of the City of Rome in Italy and especially in the provinces through his own agents, appointed by himself, amenable to himself, and subject to dismissal by himself. With this he put an end to all proconsular independence in the provinces and gave the vast Empire a centralized Government of the most effective sort. In Rome itself he allowed the old constitutional bodies to remain, but he secured from the Comitiæ his election with a permanent term, as both Consul, Tribune, and Prætor, and took and held the ground that the Senate and Comitiæ were only the Councils of the Consul and had no lawmaking power. They could only approve or disapprove when their counsel should be solicited by the Consul.

Such, in brief, was the Imperial system which Cæsar constituted and established, and in it there was no place for the constitutional Liberty of the Individual or of any institution charged with its defense. Liberty had been again overwhelmed by Government and the great problem of the reconciliation of the two seemed for the moment to have disappeared again from the consciousness of men.

For five years this terrible despotism continued, terrible more in theory, indeed, than in fact, for Cæsar used his vast powers considerately, beneficently, and benevolently on the whole, when, on the 15th of March, 44 B. C., the partisans of Liberty sought to restore the old order by means of the assassin's dagger, and then it became indisputably manifest that the life had perished as completely from the old order as from the corpse which lay bleeding with three and twenty gaping wounds at the foot of Pompey's statue in the Senate Chamber. Thirteen terrible years of anarchy, with its incidents of pillage, bloodshed, and misery followed, and men became convinced that the Imperial system inaugurated by Cæsar was the only recourse, that in the course of events it had come to stay.

The triumph of Octavian, the grandnephew and heir of Cæsar, over Anthony in the battle at Actium in September of 31 B. C., marks the close of the period of confusion and the virtual restoration of the Cæsaristic régime. Octavian had had the advantage of his granduncle's experience, and while his rule seemed to be universally approved and desired, he proceeded with far more discretion and preserved with far more care and consideration the constitutional forms of the Republic. He would not allow himself to be chosen Dictator. He would not even allow himself to be chosen Consul, since this might have emphasized too strongly the Patrician element in his blood. He accepted

the office of General Proconsul in all the provinces in which military power was necessary and of Tribune in the City of Rome from the first, *i. e.*, from the year 27 B. C., and fifteen years later he accepted the office of the Pontifex Maximus. Of course, he received the commandership-in-chief of the armed forces, with the power to raise, equip, and dispose of the same in the waging of war or the maintenance of order, and was regarded as the director of the diplomacy of the state and its relations to foreign Powers. The power of the tribuneship was conferred upon him for life, and the proconsular power for ten years and renewed every five or ten years thereafter. The title conferred upon him by the Senate was Augustus, and he was generally denominated "The Prince," Princeps. He was a member of the Senate and sat between the Consuls.

Furnished with such pregnant prerogatives, Octavian gave the original form to the Roman Imperial system, under the protection of the titles and the customary procedure of the Republic. Apparently Octavian was only the Chief Magistrate of the Republic. The Senate and Comitiæ were still extant and could enact laws, but as Pontifex Maximus he could prevent their assembly or their action by declaring the moment inauspicious, and as Tribune he could declare their acts null as contrary to the rights or welfare of the people. The Consuls were still there, but his permanent and general proconsular powers cut them off entirely from the Government of the provinces which were under military régime, and that meant almost all of them, and his military prerogative of disposing of the armed forces enabled him to send them lawfully into the non-military provinces and exercise a superior supervision over the Governors appointed by the Senate and Comitiæ there. His power as Tribune enabled him to initiate law in either

the Senate or the Comitiæ, and to nominate Magistrates, and if his propositions were not adopted, he could with his other powers rule without them.

Under such conditions and in possession of such limitless prerogatives reaching in every direction it was natural, almost logically necessary, that the Principate of Octavian should develop into the Imperium of Diocletian, *i. e.*, into the system the two fundamental principles of which were the choice of the Imperator by the soldiery for a life term and his absolutely unlimited rule everywhere and over every subject. It is only to be wondered at that this development did not proceed more rapidly. Two hundred and fifty years is a long period in any part of the world's history, and the perdurance, in name at least, of the system which Octavian founded through so long a period is strong evidence of the tenacity of the principles of the Roman Republic and of the political capacity of the people who created and administered it.

In the system of the Empire as finally adjusted by Diocletian there was no place whatever for the constitutional Liberty of the Individual. The tribunicia potestas held by Octavian and nominally exercised by him in defense of the individual citizen against the action of the Senate and the Magistrates was now of no consequence, since the Emperor was both the lawgiver and Chief Magistrate, from whom all other Magistrates derived office, power, and emolument. The only hope of the citizen was again in the benevolence of Government. The great problem of the reconciliation of Government and Liberty had again apparently fallen into abeyance. The Government had become sovereign and citizens had become only subjects.

But, as usual, when the darkness was apparently deepest the dawn began its approach. In the last half of the

first century it became known, or rather rumored, in Rome that a new kind of religious association existed in the city. No one seemed to know exactly where it had its habitation or by what name it was designated. It was commonly supposed that it was some sort of a Jewish sect, since it was said to have come from the East. The authorities took, at first, no notice of it whatever. The principle of the Roman Imperial system in regard to religion was complete toleration. The Roman Empire had, so to speak, a state religion, but it was polytheism, that is, it accepted for each people brought under its sway the existing religion of that people, placed its divinities in the Roman Pantheon, made the existing Emperor its chief priest, and imposed upon its votaries the worship of the apotheosized Emperors. In this way the Imperial Government not only avoided all religious controversy with its conquered subjects, but actually turned the religion of each conquered people, under the papacy of the Emperor, into an instrument of control, even of oppression, over them.

The Pagan religions found little or no difficulty in accommodating themselves to the conditions of their toleration by the Imperial Government, viz.: the papacy of the existing Emperor and the worship of the apotheosized Emperors, since these religions were themselves polytheistic, and were already conducted by an organized priesthood, which exercised much of what we now consider civil power, as well as spiritual functions. Very soon, however, it began to be bruited about in the gossiping places of Rome that the new doctrine and sect were something quite different from any religion and any body of votaries with which the Roman Government had, as yet, come into contact. It was said that they had no stated time nor fixed place for public worship, but that they met secretly in unknown

places; that they had no priests; that they would not worship among their Gods the apotheosized Emperors, and that they would not recognize the existing Emperor as their chief priest. Here were plenty of points of conflict. The secret meetings were in contravention of the police regulations of the city; the refusal or the omission of worship of the apotheosized Emperors was a sort of *lèse-majesté;* and the rejection or non-recognition of the existing Emperor as chief priest was rebellion. The Imperial Government would be obliged, sooner or later, to take a stand about these things. It must either punish their perpetrators until they desisted, or modify its own constitutional customs, or else helplessly suffer successful defiance.

While the Emperors hesitated in the presence of these alternatives, perhaps I should say while they were becoming distinctly conscious of them, the sect spread not only throughout the city and the Italian peninsula, but throughout many other parts of the Empire. The fact was that, entirely apart from what we may call the theological side of the Christian doctrine, the new religion contained a social and then a quasi-political side, which was a necessity to the subjects of the rapidly developing Imperial despotism, in order to regain the Individual Liberty and worth which, in the transition from the system of the Republic to that of the Empire, had been lost. The dignity of womanhood, the sanctity of marriage and the home, the care of the sick and the poor, the equality and brotherhood of men before the divine Judge and Father of all, and the freedom of belief and opinion must be revived where they had before existed, and created where they had not, in order that the decay of the Roman world, which had already set in, should be arrested and civilization rejuvenated.

The Christian communities throughout the Empire seem to have been originally established on the principle of local independence, but with marvellous rapidity, considering the conditions of the age, they entered into wide organization upon the basis, originally, of a real democratic representation. In the absence of such means as exist in modern times for the development of a consensus of opinion, this organization was a necessity for concert of thought and action, but it created a volume of organized power, which could not fail to attract the attention of the Statesmen-Emperors.

Trajan, Marcus Aurelius, Septimius Severus, Decius, and Diocletian, Rome's greatest Emperors, were the real persecutors, or perhaps it would be more correct to say prosecutors, in principle, of the Christian Church. Trajan, Emperor from 98 to 117 A. D., evidently felt that law and policy required of him an attitude toward the Christian societies which his own personal disposition disapproved. He commanded his subordinate officials not to search for the Christians, but when their existence could not be blinked at to execute the law upon them. The prosecutions instituted by Trajan's Government resulted in a free advertisement, more than anything else, of the superior moral life and principles of the Christians, and for nearly fifty years more they developed their organization with but little hindrance from the Government. Upon the accession of Marcus Aurelius in 161 A. D., things had gone so far that the Government could no longer ignore the powerful institution which was rapidly gathering into itself the best administrative talent as well as the best character of the Empire, and was developing an ethical consensus which threatened the foundations of the Imperial system. This philosophic ruler employed the whole power of his Govern-

ment to extirpate the institution root and branch. Through his entire reign from 161 to 180 A. D., and also through the reign of Septimius Severus, 193 to 211 A. D., the Imperial Government followed up its prosecutions. But all in vain. Whether the Christian Church was protected by divine power or not, its moral system was the demand of human development. Its existence was more and more recognized as a necessity to balance and limit the arbitrary despotism of the Imperial Government. Forty years more of comparative rest followed the useless efforts of the Government of Septimius Severus, when another conscientious and zealous Emperor, Decius, mounted the throne and revived the Christian persecutions, 249 A. D. His were the first which extended all over the Empire at the same time. They were followed up under the form of requiring all subjects to profess one of the Pagan religions recognized by the Government. The movement was vigorous and even cruel, but it was again in vain. The most intelligent and sincere in all classes of the society throughout the whole Empire had come to understand that the Christian Church was the institution with which to combat the despotism and barbarism of the Imperial system.

I do not think that anything other than this general conviction can explain the marvellous organization of the Church throughout the Empire from, and after, the year 250 A. D. It excelled that of the Imperial Government itself in its compactness as well as in its volume of democratic power. It was also substantially a unit in its moral code, which counted far more than its theology in its struggle against the arbitrary Government and in its bid for the affections of the people. In the forty years of comparative repose between the Decian and the Diocletian persecutions, the Church historians remark the vast in-

crease in numbers and influence of the Christian Church, and at the same time a decline of earnestness and zeal among the Christians and a certain more pronounced conformity on their part to the way of the world. These historians do not attempt to explain this. Perhaps they have not understood its real meaning. The political scientist sees in it, however, the rapid influx of the higher classes of the society into the Church, their accession to the higher offices of the Church and the organization of the Church as a quasi-civil power, as an institution in which the better intellect and higher character of the Empire, excluded from the offices of the Imperial Government, could render public service and contribute to the advancement of general civilization. It was simply religious enthusiasm giving way to the efforts for moral advancement and for an improvement in civil life. The political scientist cannot regard this change as indicating any decline in Christian virtue. He sees in it only the principles of Christian morality coming to the front and transforming the actual world into their likeness.

The really great Emperor Diocletian, the Emperor who finally transformed completely the more moderate system founded by Octavian, the first Augustus Cæsar, into the completely unlimited and despotic Imperium, made one last effort to rid the Government of this newly arising curb upon its authority, of this new public institution which was disseminating an ethical system throughout the Empire which threatened on every side the foundations of the Imperial system, and which had already become so compactly and intelligently organized and administered as to outrival the Imperial official system itself. The persecutions which he ordained were general throughout the Empire, long-continued, thoroughgoing, vigorous, and cruel.

But they availed only to strengthen the Church and weaken the Imperial Government.

The really exhausted and discredited Government began to feel that it must take steps to forestall revolution. It wisely decided to yield to the inevitable as gracefully as possible. It issued the three Edicts of Toleration of the years 311, 312, and 313 A. D., and the struggle was finally ended. The edicts 312 and 313 were issued by Constantine who, after ten years of reflection, resolved to solve the problem of the relation of the Christian Church to the Imperial Government by making it the State Church of the Empire. The Emperor summoned the Bishops of the Church throughout the Empire into conclave at Nicea and settled the creed which was to be the test of membership in the State Church and then confirmed this Church in its hierarchic organization and conferred upon it certain most important powers.

It does not pertain to the subject I am treating to explain the Nicene creed nor to enumerate all of the rights and privileges conferred upon this new State Church. Of course, it became a public corporation with the functions naturally attached to such and it displaced the Pagan religions and appropriated the temples and other property belonging to such religions. The two powers conferred upon the Christian Church of the Nicene faith which have interest for us in following the efforts of the world to solve the problem of Government in its relation to Liberty are the so-called power of intercession, *i. e.*, the right of any Church official to intervene between the Government and the Individual and protect the latter against the arbitrariness of the Government, involving the power to determine whether the proposed acts of the governmental official were or were not arbitrary; and the right of asylum of all Church

sanctuaries against any invasion by the Imperial officials. Here was virtually a revival of the original powers of the Tribune of the people. Here was a limit upon the powers of the Government far more effective than the Tribunes had ever been able to exercise. It has been calculated that the number of Christian Bishops in the Empire at this juncture was approaching two thousand and the number of Christian sanctuaries was much larger. With such statistics in mind, it is very easy to see how the power of intercession now conferred upon the Church officials and the right of asylum accorded the Christian sanctuaries were a most decided limitation in principle and in fact upon the powers of the Imperial Government, and in their application were sustained by an institution which was now the most powerful organization in the whole Empire not excepting the Imperial Government itself. The protection of the Individual against the arbitrariness of the Government had been in fact exercised by the Church officials before the Christian Church had been made the State Church, but the possession of such powers by them was not till then recognized by the Imperial Government and they were exercised by them only in behalf of Christians. Now, however, after establishment, all subjects of the Emperor might be regarded as Christians and the rights of intercession and asylum were, we might say, constitutional prerogatives of the Church, to be exercised by each Church official upon his own motion. With such checks as these upon governmental power, the rapidly advancing despotism of the Diocletian Imperial system was turned back and a domain of Individual Liberty was vindicated and protected. It is true that it was still unclear what the domain comprised in principle, since it was left to the Church or rather to the individual officials of the Church to determine

when and to what extent this protection should be accorded in each case. Moreover, there was also the danger that the established Church might feel itself to be a part of the Government and might through its hierarchy of officials sustain the Government against the people, and be tempted to exercise force, instead of influence and suasion over the people, *i. e.*, to act itself rather as Government than as religious organization, and there was also the fact that an established Church is by virtue of its establishment a denial of Individual Independence in regard to religion. These dangers were all realized later, but during the first centuries after the establishment they remained in abeyance, and the Church, through its compact organization, arrived at a consensus of opinion concerning the content of the sphere of Individual Immunity against governmental arbitrariness and defended the same mightily and with general success.

In addition to all this, we must take account of the facts that the Church was now able to bring such pressure upon what we may call Imperial legislation as to give it a Christian instead of a Pagan quality and to hold the Emperor under its control by forcing upon him the conviction that it could give the moral support which would make his throne stable, and inspire the loyalty which would sustain his rule. All these influences soon manifested themselves in the new attitude of the Emperors toward their subjects and in the transformation of the laws in the codes of Theodosius and Justinian. And so it is not too much to say, in fact we must in all truth say, that the Christian Church, especially under its Western hierarchic organization, *i. e.*, under the Patriarchate of Rome, rescued the individual subjects of the Empire from the arbitrary despotism of the Cæsars, rescued the Empire from the decay of its own

suicidal course, and rescued Europe from the fate of Asia. The Constantinian reforms preserved the Empire for centuries to come and the Christian Church, under the hierarchic organization of the Patriarchate of Rome, constituted a power, both religious and civil, upon which the barbaric onslaughts of the Middle Ages would break in vain.

CHAPTER III

GERMANIA

It is usually claimed by political scientists and historians that the student of Liberty must seek its origin in the forests of Germania. Their chief authority for this assertion is the Roman historian, publicist and statesman, Publius Cornelius Tacitus, who was born somewhere about the year 54 A. D., and died about 118 A. D. In his work entitled the *Germania*, or *De Situ ac Populis Germaniæ*, he describes and eulogizes the political institutions of the people of Germania and represents them as models of civil and political freedom. It must be remembered that Tacitus lived and wrote in the period of the reign of such Roman Emperors as Nero, Domitian, and Trajan, that is, at a time when every vestige of real Liberty had departed from the Roman institutions, and that, consequently, the contrast furnished by the primitive natural German institutions was very striking, so striking as, perhaps, to have affected his critical judgment somewhat as a scientific publicist. Every classical scholar knows that Tacitus is rather hard reading and that his terse sentences are capable of somewhat differing interpretations. To me the most satisfactory interpreter of the great Roman author, from the point of view of political science, is the late celebrated German political historian, Georg Waitz, whose monumental work, *Deutsche Verfassungsgeschichte*, is the highest authority on the subject known to the learned world. It was with him that I read the *Germania* of Tacitus in

my student days and in the interpretation which I shall offer of the statements of Tacitus I shall always consult his renderings of the original text.

According to the representation of Tacitus, the Germans of the year 100 A. D., we will say, were an agricultural and pastoral people, living in small villages, cultivating a certain portion of the land, using another portion as pasture, the remainder being forest or swamp or desert. The arable land had become private property, but could be worked only in conformity to an ordinance of the community requiring a certain rotation of crops and fallow-lying. The pasture and the forest were, however, property of the community in which each owner of arable land had a right of use. The ownership of a bit of arable land in a community together with the right of use in the common pasture and forest was the basis of political citizenship. The society—if we may give so scientific a name to the population in that rude age—was distinguished by Tacitus into four classes, viz.: Nobles, common freeman, dependants, and slaves. There were not many Nobles, and the dependants and slaves did not constitute the majority of all persons. The stock and stuff of the state were the common freemen. They were those members of the community who were arms-bearing and who held land by free tenure, *i. e.*, not from any other person. The Nobles were higher than freemen only in the respect that they held generally larger estates. Their nobility was little, if any, more than notability, a higher respectability. They probably originated by the union of adjacent smaller communities into the larger tribal communities, which existed in the time of Tacitus. The officials of these smaller communities, in giving way to the officials of the larger unions, preserved for themselves and their descendants the respectability of mediatized rulers, and while the

primitive German politics did not admit of the hereditary descent of office, it did not prohibit such devolution of honor and high social standing. As the richer class they had naturally more dependants and slaves, but the common freemen also frequently had dependants and slaves—oftener, one would fancy, slaves than dependants. Dependants were what we would call leaseholders, persons who worked land on their own account, which land belonged, however, to some other person. The common freeman, as a rule, did not have enough land to let any of it. He, with the members of his family and sometimes with a slave or two, could cultivate all the land he possessed. There must have been a considerable number of these leaseholders. When one entire community was overcome in battle by another, the members of this subjected community usually fell into this dependent relation to the members of the conquering community. When, on the other hand, captives were taken, singly or in small numbers, they were generally made slaves and became dependants then only by emancipation. The difference between the dependant and slave seems to have consisted chiefly in the facts that the slave could be bought and sold as a chattel and had no standing in court, while the dependant could at the most be transferred from one landlord to another with the land which he leased, or, at least, tilled, and had a standing in court. Neither was a citizen, neither had any political rights, and, generally, neither could bear arms, except in periods of migration and of desperate defense, when the dependants were, in lesser or greater numbers, admitted or drawn into the armed force. Later on, when the Ducal and Royal power and authority were developed, the Dukes and Kings frequently took members of the dependent class into their service, both military and civil, which resulted

in giving such persons a higher social standing and in elevating the class to which they belonged.

Upon the basis of such social relations were founded the political and governmental institutions. First and most fundamental, and the source of all other authority, was the tribal Assembly composed of all the freemen and Nobles, *i. e.*, the arms-bearing landowners, acting under the presidency of a chosen Prince, or moderator. The tribe was the state, the sovereign power, as we now say, and the tribal Assembly was the organization through which the sovereignty was exercised. There was, consequently, no limitation upon its powers. Had it acted only as a constitutional convention, so to speak, constructing the organs of Government, vesting powers in them and limiting their extent, here would have been something manifesting a high stage of political thought. The tribal Assembly was, however, ordinary Legislature and, in many respects, highest administrative organ. For example, it declared war, made peace, concluded treaties, and in many cases acted as the supreme judicial body. It was thus a part and the most important part of the ordinary Government, and, as Government, its powers were entirely unlimited, *i. e.*, it was only self-limited. In lowest instance stood the Assembly of the village, composed of all the freeholders of the village, acting under the presidency of a chosen officer or moderator. Its functions were mostly of the nature of police Government and economic administration, chiefly in regard to the system of land divisions and agriculture. Both the tribe and the village were, so to speak, natural organizations and were the product of historic growth. Between the two was the more artificial division, entitled the hundred, with its Assembly composed of all the arms-bearing landowners of the division under the presidency of a

Prince chosen in and by the Assembly of the tribe, one for each of the hundreds which composed the tribe or rather into which the tribe was divided. This Assembly was more a judicial body than anything else and was, therefore, more constantly in session. Its President, the Prince, or Princeps, as Tacitus called him, was the one permanent executive officer of the primitive Germanic Constitution. As I have said, he was elected in and by the tribal Assembly, and he held for life usually. He was authorized to keep a body of retainers, not only for the protection of his person and the maintenance of the dignity of his office, but, also, for executing the decisions of the hundred Assembly. His office was permanent and continuous while that of the President of the tribal Assembly lasted only during the sessions of the Assembly. In the sessions of the tribal Assembly these Princes of the hundreds acted as a sort of general committee for the preparation of the business which was presented to the Assembly, and it was they who usually executed, each in his own hundred, the resolutions of this Assembly as well as those of the hundred Assembly, since they alone in the absence of a Prince of the tribe, which was the usual situation, possessed the organization for the enforcement of the law, viz.: the band of retainers. These bodies were recruited by them out of every class of the society except the slaves. Generally, however, it was the young scions of the nobility which composed them. The common freemen and their sons and the leaseholders were generally occupied in tilling the soil. The estates of the Nobles, on the other hand, were usually tilled by slaves or leased to dependants, and their sons were free to follow war or the chase, or take up service with the Princes. When the Prince had need of force to execute the law, they were there to do his bidding. When

he chose to go on adventure, they were his followers. And when the entire tribe engaged in war or migration, they formed, so to speak, the staff of the several Princes, as military Commanders. When not engaged in any of these pursuits they, as the table companions of the Prince, were eating and drinking and carousing with him.

Such were the usual political and governmental institutions of the primitive German state. Tacitus does mention, however, tribes which had a Prince of the tribe as well as Princes of the hundred divisions within the tribe. He also mentions unions of tribes which had Kings, such as the Goths, the Marcomanni, the Quadi, and the Hermanduri. From what he says it is evident that where the tribe had a Prince, that is, a single Chief, elected by the tribal Assembly and holding for life, such tribe was an older development than that attained by most of the tribes, that is, it was a tribe in which the local spirit had been in higher degree overcome. In other words, such a tribe was passing over from the confederate to the federal stage in its development. Such a Prince was not distinguishable, however, from the Princes of the hundreds within his tribe, either in tenure or term of office. The subjects of his administration were different from those coming under their administration, but his authority, as theirs, was derived from the tribal Assembly, which elected both him and them; and the means of executing the law were the same in both cases, viz.: the body of retainers. This organization around the Prince of the tribe may have been larger and possessed of more dignity in the eyes of the people, but it was composed in the same way and of practically the same material, and its methods and activities were the same as that around the Prince of the hundred.

On the other hand, in those tribes or rather unions of

tribes which had Kings a new conception of power was introduced, viz.: an element of independent authority belonging to a particular family, the active member of which was still designated in the most general Assembly of the tribe or union of tribes. In other words, the principle of hereditary right to the Chieftaincy seems to have manifested itself among certain of the tribes or unions. This must have been a development brought about by a long period of war or migration or both, and the Kingly office and power must have gradually developed out of the military Chieftaincy, as I shall describe later in the case of the Salian Franks. It is hardly conceivable that any tribal Assembly of the primitive German state would have, consciously, intentionally, and at a given moment, elected a Chief to hold office by hereditary right.

From a critical survey of these details we are forced to conclude that what we are dealing with in the primitive Germanic politics is a broadly aristocratic Republic with an unlimited legislative Government. The heads of families owning land and bearing arms, organized in their Assemblies of the village, the hundred and the tribe are, with their chosen agents, the Government in each case. Assuming that the dependants and slaves numbered about one-half of the population and that each family was composed, on the average, of five members, the number of those participating in political power would have been not over one-tenth of the entire population. Granting that each head of a family represented, on natural principle, the members of his family and acted for their best interests, there would still have remained at least half of the population entirely outside the bounds of any kind of representation.

This is a vital point in the sort of governmental system

which we are now examining. The primitive German state secured Individual Liberty only by participation of the Individual in governmental power. This is one way indeed to secure such Liberty, but it is a crude way and an ineffectual way. It is crude because it does not separate, by fundamental constitutional principle, the realm of Individual Liberty from that of governmental policy, nor does it provide any impartial non-political means for safeguarding such a domain. And it is ineffectual, because by the manner of its action it protects only the majority of those participating in the exercise of governmental power. The Individual Liberty of those composing the minority of the participants in Government, as well as of all those who are not so participant at all, will not be conserved by any such means and methods. Now, the real test of the real existence of Individual Liberty in any political and governmental system is whether that system presents a fairly well-defined realm of Individual Liberty, of individual exemption from governmental power, and provides the means for the protection of that realm, as well against encroachment by the Government as against encroachment from every other quarter. The primitive German system made no such provisions. It simply trusted everything to the benevolent disposition of the majority, in each case, of the participants in the exercise of governmental power. The fact that these participants in governmental power were the landowning, arms-bearing adult males did not render unlimited Government by a majority of these one whit less despotic in principle than when exercised by the Roman Emperor.

I do not see, therefore, that the primitive German political and governmental system at all solved the great problem of the reconciliation of Government with Liberty. I

do not even see that the primitive German system made any provisions worth the mention for distinguishing Individual Civil Liberty from participation in political power or for securing the same against encroachment by the ordinary political authorities. It seems to me that we have here again a political and governmental system which, in principle, sacrifices Individual Civil Liberty to Government, no matter how lightly, considerately and benevolently Government might exercise its powers. I think we shall have to travel much further down the ages to find the kind of Liberty for which we are looking and to find the means for conserving it against governmental encroachment without producing anarchic or demoralizing or disorganizing results.

CHAPTER IV

THE FRANKISH KINGDOM

As I have already indicated, it was the custom of the German tribes in periods of war and migration to suspend their Government by the Assemblies and its elected agents and to select a military Chieftain for the time of such movements and vest in him unlimited power. At first their terms were of shorter duration and the suspension of the ordinary Constitution did not last so long as to allow the powers of the military Chief to become permanent or quasi-permanent through age. At the end of the military enterprise, the Chief, the Leader, Dux, Herzog, Duke, must relinquish his power and office on pain of grievous punishment should he fail to do so. Arminius, Duke of the Hessians, lost his life at the hands of his own followers for attempting to hold on to his office and powers after the close of a successful campaign. But when the migrations of the tribes and confederations of tribes into the territory of the Roman Empire lasted through decades and centuries and when the cessation of the migratory movements was gradual and extended through long and indefinite periods, the conditions for a return to the customary Government by the Assemblies were not again so definitely and decidedly reattained as to bring about the prompt abdication of the military Chieftain, the Duke. In other words, the long period of the migrations, from the second to the sixth century, favored the permanency of the unlimited Government of the Duke and the transmission of the office to his

own descendants or at least family relations, since they would be instructed by him in the discipline and experiences of the command and would inherit from him his arms and material of a military nature. In still other words, the continued condition of migration, war, or hostilities favored the development of the Ducal office and power into the Kingly, the system of the hereditary Chieftaincy in peace as well as war.

Already in the early part of the fifth century the tribes occupying the territory along the east bank of the lower Rhine and reaching, at points, over to the west bank, the Salian Franks, had formed a confederation under the military Chieftaincy of one Clojo, and as Clojo's son Merovius followed him in the command, and Merovius's son Childeric followed him, and Childeric's son Clovis followed him, we may say that by 486 A. D. the Royal system of Government was several stages advanced in its development and was rapidly displacing the primitive Government by the Assemblies of the freeholders. Still there was always the danger to the house of Merovius that, when a condition of permanent settlement should be finally attained, the demand, and then the movement, would be made for the restoration of the ancient Republican Constitution. No one recognized this danger more clearly than the astute Clovis, who, in 481, when only fifteen years of age, was, by the death of his father Childeric, compelled to face the problem of making good his right of succession to the office and power which his father had held. Consciously or unconsciously, Clovis struck out at once in a direction, I will not call it policy, which was best calculated not only to secure his own inheritance of his father's position, but to establish so firmly the right of his house to the governmental supremacy over his subjects, that it was not again

questioned, until the decay of the Merwing family itself caused its own displacement.

Upon his accession, in 481, his Franks had advanced toward the Southwest as far as the river Somme. They had not to this time disputed the governmental supremacy of the Romans over this territory. They had occupied it under the consent of the Roman authorities and had recognized their sovereignty. At that moment the Roman Governor over the region was one Syagrius, and his official seat was Soissons. Exactly to whom Syagrius was, as Governor in Gaul, directly responsible was not very clear. Five years before this Odoacer, the Gothic Chieftain, had driven the Co-Emperor out of Ravenna and had seized the reins of Government in Italy himself. The leading men in Italy had acquiesced in the usurpation and had besought the Roman Emperor at Constantinople, Zeno, to do away with the system of two Emperors, one at Constantinople and one in Italy, assume the entire Imperial sovereignty himself and appoint Odoacer his general Lieutenant in the West. The Emperor Zeno entertained and accepted their proposition and the reign of Odoacer was made thus legitimate in Italy and perhaps over all of the Western provinces of the Roman Empire. Neither Syagrius, however, nor the other Roman Governors in the West, relished the idea of subordination to the Emperor's barbarian representative in Italy. He, especially, set about realizing a plan for erecting Gaul, or a large part thereof, into an independent Kingdom for himself. This movement on the part of Syagrius furnished Clovis his supreme opportunity and, though only a youth of twenty-one, he seized upon it with an insight, a promptness, and a vigor, which are usually to be found only in mature and experienced men of greater age. Proclaiming his loyalty to the Emperor at Constan-

tinople he, at the head of his four thousand trained warriors, threw himself upon the rebel Syagrius, vanquished him, and put him to death.

Being now himself the only Government left north of the Loire, he promptly set to work organizing his authority over all of Northern Gaul. His next step was equally statesmanlike. He saw that the Gallo-Romans were controlled chiefly by their Bishops and that the friendship and cooperation of the Bishops of the orthodox Church were indispensable to the full realization of his plans. He immediately began cultivating their friendship, seeking their advice, deferring to their wishes, confirming their jurisdiction as conferred by the Roman Imperial Constitution, and increasing their possessions from the domains of the Roman Imperium, which he had promptly seized as the representative of the Emperor in Gaul, and finally in 496 acknowledging conversion with his whole people to orthodox Christianity.

The dramatic description of this conversion given by the early historians is not germane to our subject and need not be repeated here. We will only refer to the political advantages gained by it. In a word, it simply made the King of the Franks the defender of the orthodox Christian faith not only against individual dissenters, but against the other German rulers and tribes who had seized upon other parts of Gaul, viz.: the Visigoths in Aquitania south of the Loire and the Burgundians in the southeast, and it secured the vast influence of the Bishops throughout all Gaul over the Gallo-Romans in behalf of the legitimacy of the Frankish King and the extension of his reign over all Gaul. This all came quickly to pass and at the same time the Roman Emperor, Anastasius, influenced by the loyalty, real or pretended, of Clovis in dealing with the

treason of Syagrius, and by the attitude of the Gallic Bishops, made him Patrician and Roman Governor or Proconsul in Gaul. With this act of the Emperor and the attitude of the Bishops the loyalty of the Gallo-Romans to King Clovis was secured, and their obedience to his Government as legitimate was established.

Moreover, the authority of Clovis as Roman Proconsul in Gaul and Defender of the orthodox Church had a powerful reflex influence upon his relation to his Frankish followers. In a word, it made it impossible for them to demand his abdication in favor of the re-establishment of the primitive German Constitution of Government by the Assemblies of the freeholders. His Kingship, *i. e.*, his hereditary Government over the Franks, was now established beyond all peradventure. Here was now the state which was to take the place of the Roman Empire in guiding and directing the civilization of Europe for centuries to come.

Let us examine, now, whether in its Constitution and organization it contained any provision for the solution of our problem of the reconciliation of Government with Liberty. Naturally, there was no such thing as a written Constitution for a state having such an origin as the Merovingian Kingdom of the Franks. There was, indeed, a law book of the Salian Franks, dating back to a period before the rise of the Merwing Chieftains, but it contained little or nothing in the way of public law, and as to the question of Individual Liberty it certainly went no further than to fix the common custom in the dealings of men, in other words, due process of law between man and man. It contained one provision which furnished an example for the law of descent of the Crown. It was that no woman could hold land; in other words, that land was heritable only in the male line.

The military origin and the military character of the Kingdom of the Franks made, however, this new state, in principle, a military despotism, in which the will of the King was law, law administered by his own appointed agents, responsible to him and dismissible by him at his pleasure. But there were many things which stood in the way of the full realization of such a principle. The main thing, the one thing above all others, was the Christian Church, well organized under its Bishops, and possessing, according to the Roman public law, the power of intercession with the Government in behalf of the individual and of the people, and the power of controlling and administering education and charity, and the law of domestic relations. The authority of the Frankish King over his Gallo-Roman subjects depended almost entirely upon the influence of the Bishops and lower Clergy over the people. He must, therefore, in his Government not only leave them in possession of the powers recognized to them by the public law of the Roman Empire, but he must increase those powers from time to time, in order to maintain their friendship and co-operation. Then, the development of the agrarian relations raised up an aristocratic class which was little inclined to endure any unlimited powers in the Crown. The vast public domain in Gaul was, of course, seized by Clovis as the successor to the Imperial agents. Upon this domain his crude fiscal system was based. He divided the most of it among his followers in arms as compensation for future as well as for past service. He created thus a class of Manorial Lords, holding vast landed estates which they worked either with slaves or let out to tenants on condition of service or payment of some kind of tribute. These Lords assumed the powers of local Government over the residents upon their estates as the incident of their prop-

erty in the land. It was naturally the understanding of the King that he had given to these followers these properties in possession, without definite tenure, and upon condition of certain service or tribute of an honorable character to be rendered to the King. On the other hand, those of them especially who held the larger estates regarded these as their own share of the conquested booty, over which the King had no further power and to which he had no further claim. In other words, the King considered these properties as under feudal tenures, tenures according to which the ultimate property remained in the Crown, while the Manorial Lords regarded them as of allodial tenure, tenures according to which the ultimate property, as well as the immediate possession, was in the Lord. This difference of view upon this fundamental question was bound to force the Manorial Lords to combine, to organize for the protection of their property rights as they conceived them, against the Crown. Finally the Salians who still inhabited the Eastern part of the Kingdom, the Germanic soil along and east of the Rhine, and the other German tribes which had been subjected to the Salian King, viz.: the Riparian Franks and the Alemanni, still retained the traditions of the primitive German Constitution in sufficient degree at least to render the despotic Government of a King over them a practical impossibility.

Here were, in brief, the elements which even separately were sufficient to protect the Liberties of the Individual against a Royal despotism; in combination they threatened the sacrifice of Government to Liberty, *i. e.*, they threatened to produce anarchy. The struggle which began before the death of Clovis in 511 continued with somewhat varying fortunes for a hundred years, always

tending in the long run to the triumph of the ideas of the Nobles and Clergy in regard to their immunity from the Royal authority. The division of the Kingdom between the four sons of Clovis in 511, according to the old Salic law of the descent of landed property, and a second division between the sons of Chlotaire I in 561, after a short reunion of all the parts under this sole survivor of the sons of Clovis, weakened the Royal power and consequently aided the Nobles and the Clergy in securing a further exemption from the King's Government. Meanwhile the confusion which reigned everywhere forced the small landholders to seek the protection of their noble neighbors and the price of this protection was the surrender of their little properties to their respective protectors, retaining the possession of them and paying the protector tribute for the possession. It also caused the inhabitants of the cities to come more and more under the government of their respective Bishops. The King's governmental agents in the localities, viz.: the Counts, were thus limited more and more in the territorial extent of their respective jurisdiction over the ordinary subjects of the realm.

It was the custom of the Frankish Kings to reward their Counts by attaching an estate to the office. As now the Count's jurisdiction over the ordinary subjects was narrowed, he too gave personal protection to the small landowners around his estate upon like terms as the Manorial Lords. His official power helped him to force such persons into such private relation to himself. In other words, as his official power grew less, he developed into a Manorial Lord with private jurisdiction over the tenants of his official estate as well as those of his private estate, and as the two were inextricably commingled, he claimed to hold the official estate as heritable property and the office of

Count also, which now became more and more the incident of the estate.

Such was the condition of the Kingdom at the beginning of the seventh century, when the Nobles and Clergy combined to enforce their claims against the Crown. The Nobles were led by Pippin of Landen, the Chief of the Nobles of the Eastern part of the Kingdom, then called Austrasia, and the Clergy were led by Arnulf the Bishop of Metz. They resolved to restore the unity of the Kingdom by making Chlotaire II sole King, force him to rule through three Mayors of the Palace, one for each of the existing divisions of the Kingdom, viz.: Neustria, the Western, Austrasia, the Northeastern, and Burgundy, the Southeastern, and to extort from him a charter of their liberties, rights, and privileges. This all came to pass in the years 614 and 615. Of these three provisions of reform, the one most important to the question we are discussing is, of course, the charter of liberties. This comprehended, first, the acknowledgment on the part of the Crown of the hereditary tenure to, and full property in, all the landed estates of the Nobles and confirmation of all the grants to the Bishops as of perpetual force; second, complete restitution of all properties which any of the Kings had taken from Nobles or Bishops; third, the independence of the election of the Bishops by the Clergy and people; fourth, independence of the Judicial Magistrates and the right of every person to a standing in Court; fifth, immunity of the Clergy from responsibility to the Royal Courts and widening of the jurisdiction of the Church tribunals; lastly, abolition of the taxes levied by the Kings on the estates of the Nobles and of the Church. The Nobles and Clergy proposed as a body, under the direction of Pippin and Arnulf, to enforce the observance and execution of these pledges. Furthermore, they resolved to

elect in each division the Mayor of the Palace through whom the King should rule. Here was certainly a conscious attempt on the part of the higher classes, what we may call the aristocracy of the Kingdom, to reconstruct Government, give it its proper unity and authority, define Liberty, and reconcile the two in a more advanced political system.

Let us examine now a little critically just what this movement effected. It certainly secured the Nobles and Clergy sufficiently in the enjoyment of Individual Liberty and Immunity against governmental power. In fact it went too far in this direction, because the Nobles and Bishops were not simply private persons and the privileges secured to them were not simply of a private nature. The properties confirmed to them were the original domain of the state, and their withdrawal from the duty of contribution to the Government left the Government without any sufficient revenue to accomplish its ends. Again the Nobles and Bishops were local Governors over the inhabitants of the manors and of the cities. The withdrawal of their jurisdictions from Royal supervision was a step in the direction of the universal dissolution of the Kingdom, *i. e.*, in the direction of anarchy. And lastly in spite of the provision that every person should have a standing in the Royal Courts, the fact that the Judges of the Royal Courts, viz.: the Counts, were themselves developing private manorial jurisdictions in the manner already indicated, at the expense of their official powers, helped on the general trend of the development of the aristocratic Republic under monarchic appearance, the principle of which generally is oppression downward coupled with defiance upward.

In less than ten years from the establishment of the Constitution of Chlotaire II, the aristocratic development

had proceeded so far, especially in the Eastern part of the Kingdom, that Chlotaire was compelled to send his eldest son, Dagobert, still in youthful years, to Austrasia and allow him to set up a quasi-independent rule under the direction of Pippin of Landen and Bishop Arnulf. This showed how much or rather how little the Nobles regarded the unity of the Kingdom which they had less than ten years before insisted on. In 628 Chlotaire II passed from earth, leaving two sons, Dagobert and Charibert. Dagobert at once asserted his sole right to the whole Kingdom. He appears to have done this of his own initiative. He was still young, but he seems to have been a real statesman. He saw, at the outset, that to realize his purpose of the rejuvenation of the Royal authority he must proceed from Neustria, instead of aristocratic Austrasia, as his nucleus of power. He left Austrasia to Pippin and Arnulf, went into Neustria, set up his court at Paris, was the founder of Paris as the capital of France, and undertook to restrain the Nobles and the Clergy and to elevate the common people and to administer even-handed justice to all in the Royal Courts. His success in Neustria was very great and promised the restoration of the Royal power everywhere. But again the Austrasian Nobles demanded a separate King and Dagobert was obliged to send his three-year-old boy Sigebert to give the outward form of authority to anything which Pippin and Arnulf might choose to do.

In 638 the good King Dagobert died, leaving Sigebert, a boy of eight years, as King in Austrasia, and Clovis II, a child of four, as King in Neustria. The aristocratic principle had triumphed completely over the monarchic. The period of the Rois Fainéants had begun. The Kingship was now used by the Nobles and Clergy to cloak their own actual rule. They had entirely abandoned their orig-

inal function of a check upon governmental despotism in behalf of Individual Liberty and had become an unlimited aristocratic Government, but with a bond between its constituent elements so slender that the despotic unity was almost immediately rent asunder by the ambition of every Noble and every Bishop to rule independently in his locality. The common man went to the ground everywhere, except in the cities under the milder rule of the Bishops. Elsewhere he became the vassal or tenant or slave of the Manorial Lord. Apparently, Government had been sacrificed to Liberty, but this was true only in behalf of the Nobles and Bishops. As to the common subject, Liberty had been sacrificed to the unlimited local Government of the Nobles and the Bishops. Fifty years more of this wretchedness followed until the Nobles and Bishops themselves were made to feel that their excessive independence must be placed within bounds.

The Nobles of Austrasia elected Pippin Heristal, the grandson of Pippin of Landen, their Duke as well as Mayor of the Palace to the Merwing King in Austrasia, and in the battle of Testry in 687, he and his Austrasians conquered Neustria, and he assumed the rule in Neustria and Burgundy, *i. e.*, the other parts of the Kingdom, as Mayor of the Palace to the Merwings. With this the Royal power throughout the Kingdom was in one hand again, the hand of the mighty Duke of Austrasia, in whose house the Mayorship of the Palace in Austrasia had become virtually hereditary. Still the Pippins did not yet venture to wield the Royal power in their own names. The legitimacy of the Merwings was too strong a spiritual power among the masses to risk, as yet, revolution over a name. The Pippins must win the favor of the Bishops, and the Bishops and Clergy must educate the people before this step could be safely taken.

CHAPTER V

THE CAROLINGIAN EMPIRE

The creation of the Holy Roman Empire of the German Nation in the last three-quarters of the eighth century was the mightiest work of the entire Middle Ages. This great Institution bridged the whole way between ancient and modern times. The appreciation of the elements out of which it was constituted and the welding of these together into the vast state body bearing this name give evidence of an intellect and a will, in a word of a personality, whose equal is difficult to find throughout historic time. In fact we cannot attribute this great work to a single personality. In the first place, four of the most mighty state builders which the world has produced out of a single family wrought upon it through more than a hundred years. Pippin of Heristal, Charles Martel, Pippin the Short, and Charles the Great, and with these we must connect in the first rank the Bishops of Rome, Gregory III, Zacharias, Stephen III, and Leo III, and the great Archbishop of Metz, Boniface, to say nothing of hundreds of others, lay and clerical, who contributed no small share. The enterprise was nothing less than the union of all the German tribes and peoples upon the European Continent into one great state body with the West Roman and Romanic peoples, having for its cementing bond the orthodox Christian Church as represented by the Bishop of Rome, the Empire of orthodox Christendom.

The conditions, ethnical, social, political, and religious, existing during the eighth century in Europe seemed to make such a consummation impossible, but to the eye of the great Carolingians they really conspired to assist in bringing it about. I am not writing a history exactly and will not, therefore, hold myself to a sequence of dates in giving a brief survey of these conditions. There was, first, the internal situation of the Kingdom. As I have before indicated, the Royal authority had ceased to be any real power. The Manorial Lords and the Bishops had absorbed the entire Royal domain, and had organized almost independent territorial Governments within their respective estates. The Bishops, moreover, exercised quasi-governmental powers, *i. e.*, powers which could be executed by physical force against all opposition, over the entire population, that part not resident upon the Episcopal estates as well as that so resident. Then the original Royal officials, the Counts and Margraves, whose jurisdiction over the Counties had become so honeycombed by the development of the Manors and the Episcopal estates that but little was left to them except their jurisdiction over the estates attached to their offices as salary for their services, had succeeded in making these estates private property and ruled therein as Manorial Lords rather than as Royal officials. Finally, the fainéant Merwings themselves were under the complete control of their Majordomo, now the powerful leader of the Austrasian Nobles, the chief of the house of the Pippins. In the second place, the Kingdom and Christendom itself were threatened from without, and from two directions. The Moslem invasion had rolled over Northern Africa, over Hispania, and across the Pyrenees themselves and was already advancing toward the valley of the Loire, and the Pagan Saxons were threatening the boundaries on

the northeast. In the third place, the Lombards who had occupied the Po valley were preparing to make conquest of the Exarchate of Ravenna, the seat of the Roman Governor in Italy, and the Roman Emperor at Constantinople was in conflict with the Bishop of Rome over the so-called worship of the images in the Western Churches. Finally, the Bishop of Rome not only exercised the secular Government as well as the ecclesiastical authority in Rome but claimed the Patriarchal power over the whole West Roman Empire, *i. e.*, the power to appoint Archbishops and vest them with control over the Bishops and thus re-establish hierarchic unity in the Western Church.

No one can tell whether the Carolings planned the course which they followed in view of these conditions at the beginning or at any given point in their progress, but all they did was so rational, so consistent, and so successful that it all appears as parts of a consecutive whole. They seemed to understand that they must have at the same time the support of a great army and also of the Church as a unit. How could they secure both of these things, when the means for constructing and maintaining such an army must be taken from the Church, or better, from the Bishops? The vast Crown domain which the Merwings had bestowed upon the Bishops must be reclaimed by the Carolingian Chief and its use bestowed upon laymen as pay for military service. How, then, could the support of the Church be secured and retained under this scheme of confiscation of Church property? The Carolingians found the way. They sought and secured the friendship of the Bishop of Rome by delivering him both from the power of the Lombards and the Byzantinian Emperors, and by re-establishing his position of Patriarch of the entire Western Church, and finally by giving him the Exarchate of

Ravenna as Church domain over which he should exercise secular as well as spiritual power. Through the Bishop of Rome and the Monks sent out by him as his Legates in all directions they influenced the Bishops to abstain from dissipation and luxurious living and to follow more closely their spiritual calling, and persuaded them that unless they surrendered a part of the properties which they had received from the Merwings to the state, the state would be unable to defend any of their possessions or even their lives and the existence of the Church against the Moslems on the one side or the Pagans on the other. Many of the Bishops yielded readily to these views and those who did not were so overwhelmed by the pressure from the Monks, the Roman Legates, the public opinion, and the will of the Carolings that the general confiscation was carried through; and with the restored domain the new army of liegemen was created by which the Moslems were driven back and the Lombards and the Saxons conquered.

The results of these movements and this policy were most important to civilization. They established, in the first place, the Papacy of the Bishop of Rome, which consisted of the Patriarchate of the entire Western orthodox Church, whereby he could appoint the Archbishops, effect the union of bishoprics into archiepiscopal provinces and, by the bestowal of the pallium upon the Archbishops, vest them with the superior control over the Bishops, assemble Councils of the entire Church and preside over them, create Monastic orders and send the members of them as Legates into every diocese to watch over the conduct of the Bishops and secular Clergy and report the same to him, together with the secular Government of the City of Rome and the Exarchate of Ravenna, the so-called Roman Duchy. Modern historians, and we moderns generally,

are inclined, by far too much inclined, to regard this creation of the Carolings as a great historical error, which has plagued European civilization from that day to this. I cannot so regard it. I must look at it from the point of view of the conditions which it met and the problems which it solved. Except for the hierarchic organization of the Church culminating in the Papacy of the Roman Bishop, and for the Monastic orders created by the Popes and acting as his immediate agents throughout Western Christendom, the Church officials would have become completely demoralized, would have become territorial Lords with secular governmental functions, living in riotous luxuriance, and would have transformed the spirit of Christian unity into an actual anarchy of hostile Chieftains, and, except for the temporal power of the Popes over Rome and the Exarchate, the Christian Church would not have been able to check the despotism of secular Government. Let it be always remembered that at that period of the world's history men had not discovered the distinction between the state, the unlimited sovereign, and the Government, its limited agent for accomplishing certain of the state's purposes, viz.: those which are to be realized by the employment of physical force, if necessary. Then and on that account, Government was theoretically unlimited and actually so, if strong enough to execute its will. Until this distinction should be reached and Government should be limited by the state in behalf of Individual Liberty, one of the elements of which is the freedom of the religious conscience, the Church organization was obliged to be hierarchic and the head of that organization was obliged to have temporal power, in a district and over a population large enough to protect him, and through him the Church at large, against the rude despotism of secular Govern-

ment. The Carolings committed no error in the work which they did for the development of the Papacy of the Roman Bishops. Without it I conceive that the Christian Church would have become secularized and heathenized beyond recognition and the Middle Ages would have really been that age of darkness for which, in spite of its remaining magnificent monuments of civilization, culture, and enlightenment, it has been erroneously held.

The other great result of these movements and this policy was the creation of the Holy Roman Empire of the German Nation, which was the great controlling force in the civilization of the European Continent for a thousand years and held the forces of anarchy and heathenism at bay until the national developments of the eighteenth century produced the ethnical and ethical conditions for the new political civilization of the modern time. The first step in this great constructive work was the transfer of the Royal power from the decadent Merwings to the capable and powerful Carolings. It is always a critical, not to say a perilous, thing to effect a revolution like this. To dispossess a family of a throne held by the principle of hereditary right was felt then to be an attack upon the principle according to which anybody held anything. How sensitive the Franks were upon this point may be inferred from the incident of the year 687 when Grimoald, the son of Pippin of Landen, sent the Merwing heir to an Irish cloister and proclaimed his own son King. The Nobles felt at once the demoralization of their own titles by this act. They rose en masse, seized Grimoald and his son, restored the Merwing heir, Clovis II, and delivered the Royal desecrators of the throne into his hands, who immediately executed them. The Carolings were taught by this experience that they must bide their time until a

new morale should be created and embraced by the great mass of men, upon which this change could be founded. They resumed their old place of Mayor of the Palace to the Merwings and addressed themselves, among other things, to the work of inventing a new principle of legitimacy by which to effect the ominous and all-important change of dynasty. They must have had this in mind in approaching and cultivating the Bishop of Rome, for, after more than two-thirds of a century from the death of Grimoald, Pippin the Short, feeling that the time was ripe for a new effort, made as his first step an appeal to the Bishop of Rome for his approval of the assumption of the Crown by the Carolings. The Bishop seems also to have been fully prepared for the appeal. He approved the change of dynasty and commanded the great Archbishop of Metz, Saint Boniface, the Apostle to the Germans and the Bishop's Legate for the Frankish Kingdom, to bless this change by anointing Pippin King of the Franks. This was done in the year 752 in the cathedral at Soissons. The Bishop of Rome as Patriarch of the Western Church and, therefore, as High Priest of the orthodox Christian Church thus created the new morale for deposing and elevating Kings, viz.: the word of God as voiced through him. It is true that there was some sort of an election or acclamation by the Nobles and officials, but, while this gave assurance that the fate of Grimoald and his son would not be repeated, it had no such influence over the mind of the masses as the declaration of the Bishop through the great Boniface that thereafter the Carolings were the rightful Kings of the Franks. A few years later the Bishop himself, Stephen III, came from Rome to Rheims and reanointed Pippin and his sons Kings of the Franks. At the same time he conferred upon Pippin the title of Patrician of Rome and laid

upon him the obligation of defending the Holy City against all enemies, especially against the Lombards. The following year, 755, Pippin redeemed his pledge, tore the Exarchate of Ravenna from the Lombards and conferred it, as to its Government and public properties, upon the Bishop of Rome as the States of the Church. One year later he went again across the Alps, inflicted upon the Lombards another disastrous defeat and increased the States of the Church by the cities of Rimini, Pesaro, Fano, Sinigaglia, and Ancona.

It was reserved, however, to his great son Charles to put the capstone and the finish upon the great work. For thirty years, from 770 to 800, Charles extended by force of arms the boundaries of the Kingdom until it stretched from the Eider in the Danish peninsula to the Ebro in the Spanish and from the Atlantic Ocean on the West to the coasts of Dalmatia in the East. It included all of the German tribes, the Italian and Gallo-Roman populations, and a large Slavic element. It was no longer a Frankish Kingdom in fact, but the Empire of Continental Europe. The moment had come for the new creation, and it was undertaken, again, in understanding with the Bishop of Rome. In 799 the inhabitants of the City of Rome revolted against the Government of Bishop Leo III. Leo fled across the Alps to the camp of King Charles at Paderborn. There these two great characters laid their heads together and out of their deliberations sprang the plan of the Holy Roman Empire of the German Nation. What that plan was the sequel will show. Meanwhile King Charles sent the Bishop back to Rome with a powerful escort of loyal Franks to restore him to power and protect him in the exercise of his functions until he, Charles, should come and sit in judgment between the Bishop and his ac-

cusers. At the end of the year the King advanced to Rome at the head of a large force. No opposition whatsoever raised its head. He assembled a Council of Bishops and bade them proceed with the trial of Leo, but they, probably prompted by the King, disavowed jurisdiction over the incumbent of the Apostolic seat, and the King disciplined his accusers. Then came the final act. On Christmas Day, according to the time-reckoning then employed the first day of the year 800, Charles and his Chieftains and the leading Romans assembled in the Apostolic Church to hear the mass read by Leo himself. Suddenly, as if by inspiration, the Bishop approached the kneeling King, anointed him with holy oil and placed a Crown of gold upon his head and the surrounding multitude shouted: "To Carolus Augustus, crowned of God, great and peaceful Emperor of the Romans, life and victory." The die was cast. The great act was performed which determined the political history of Continental Europe for the next thousand years.

Let us now examine the system of Government and Liberty resulting from this combination of elements and forces in somewhat larger detail. In the first place, the Imperium was unlimited authority, sovereignty, derived from God, a power over subjects, not a power conferred by the people or by anything human. This was expressed in the acclaim of the multitude: "crowned of God," and was also declared by the Bishop Patriarch of Rome, as God's human agent in transmitting such authority. We will not enter, at this point, into the question whether the Bishop of Rome might exercise any discretion of his own in withholding this authority or withdrawing it. That will come later. No such idea prevailed at the moment of this first coronation. The new Emperor unquestionably considered

the Imperial sovereignty as his own, to be transmitted to his family descendants without any interference with the inheritance by anybody. We may say, then, that we have here a solution of the first problem of political science, viz.: the question of sovereignty, unlimited original authority. It was the very substance of the Imperium and it was exercised by the Emperor.

The Emperor was also the Government as well as the Sovereign, unless he should choose to create, as Sovereign, a Constitution or charter and establish through it a Government separate from himself and vest it with powers and impose upon it limitations. This he did not do. In fact, the distinction in idea between sovereignty, *i e.*, the state, and Government, the agent of the state for accomplishing certain ends by physical force, had not arisen in the thought of the age. The Sovereign was the Government. The state ruled immediately. We may call this form of Government immediate Government, which means unlimited or despotic Government in theory. Whether such a Government may be able to realize its despotic power or not is another question. In analyzing the Carolingian Constitution, it is sufficient for us that we start out from the principle of the God-conferred sovereignty of the Emperor. It makes the way easy for us. We do not have to consider at all whether the Emperor, as Government, has the authority to do one thing or is prohibited from doing another thing. Anything that the Emperor does or commands is lawful. His sovereignty makes it lawful. The civilization of the Orient and of the Roman Empire had prepared the minds of men to appreciate and entertain this idea. We start then with the Emperor as Sovereign and Government, the source of all law, of all office and authority, of all rights, immunities, privileges, and

honors. It is true that there existed already bodies of custom and of something like law in the different parts of the Empire, and officials and other exercisers of authority and persons enjoying immunities and privileges of various kinds, but these must all now be considered as further existing by permission of the Emperor, and subject to his disposition. The fact that he allowed much to remain as it was and proceeded only gradually in introducing changes must not confuse us as to the theory of the Imperial authority.

With such a theory of Government the next point to be considered is not the system of Assemblies, but the official system, since the Assemblies were composed chiefly, if not entirely, of the *Officials*. Charlemagne had already had sufficient experience with the holders of the Ducal office, *i. e.*, the office of a leader with large military functions and discretion over the inhabitants of a considerable territory, generally on the frontier, and claiming title by hereditary right; and yet it was not possible to protect the boundaries of the Empire against the sudden incursions of foreign foes without an office with something of this nature, certainly as to discretionary military powers. The administrative policy finally adopted by Charlemagne was what we would term the County system. He divided the Empire into small districts in the interior and into districts of increasing size on the frontiers, and appointed as general administrative officer in each a Count, Graf, Gerifa, Sheriff. On the frontiers in the larger districts his Counts were vested with larger military discretion and were called Markgrafen, Margraves, *i. e.*, Counts in the Marks, Counts in frontier districts. The tenure in every case was appointment by the Emperor, and the term was for life, unless dismissed before the end of such term by the Emperor. The

powers of the Count were those of general administration. They executed the orders of the Emperor in the several districts and administered justice in his name. They held the chief military command and also such police authority as was then exercised by the state. Subject to them as inferior officers were the Centenarii and the Vicars, usually appointed by the Count or by the Emperor on the Count's nomination. They discharged usually the judicial powers and the police powers of the Count, while he was occupied more with the powers of political and military administration. The Emperor appointed the Counts and Margraves from any class of the people, except that among the Saxons, as a sort of solatium to the conquered Chiefs, he usually selected them. It was at the outset no evidence of nobility that one held the office of Count. To the Count's office was attached usually a landed estate, the usufruct of which constituted the salary of his office. This estate continued to be the property of the Crown, always in theory and at first in fact, only the possession or use of it going with the office.

The County system of administration was, however, honeycombed in very large degree, first by the Municipalities and second by the Manorial estates. The Municipalities, the Cities, especially those situated in the Romanic parts of the Empire, were governed by the Bishops in most respects. The Bishops were the administrators of the Roman law, which was the system of private law still obtaining between the Romanic inhabitants, since law was then regarded as personal, the Franks being judged according to Frankish law and the Romans and the Gallo-Romans according to the Roman law. The Emperor kept a Count in each Municipality, therefore, to administer the Frankish law between Franks and to sit in judgment with the

Bishop where the controversy was between a Frank and a Roman. He also sought to make the Bishop an Imperial officer by bringing his appointment more and more into his own hands, so that the Bishop became a sort of urban Count. Nevertheless the Bishops always maintained a far greater independence of the Imperial authority than the Counts were able to do, and were everywhere a check upon the arbitrariness of the Count's government. Then the Lords of the Manorial estates, those created by the Carolings, of which the grantees had only the possession and usufruct, the fee, as we would say, remaining in the King or Emperor, as well as those created by the Merwings, and held by the allodial tenure, had gradually assumed the exercise of governmental power over the inhabitants of the estates and, since the estates had become hereditary, exercised these powers as a sort of property incident to the holding of the estate. The Emperor endeavored to reduce these Manorial Lords to the position of Officials, to make of them Counts, so to speak, in these estates. But his success was only partial and finally failed altogether. In fact, as we shall see later, his Counts became Manorial Lords instead of the Manorial Lords becoming Counts. Lastly, the Emperor saw himself necessitated to allow the Ducal power to remain in a few places, as in Brittany, in the Spanish Mark, in Benevent, and at times in Bavaria. These were all serious breaks in the County system of Government, which were never entirely overcome even in the reign of Charlemagne himself. Even then they occasioned great irregularities and confusion, and after his strong hand ceased to guide the helm, they increased from year to year, until the feudal system of practically independent local powers supplemented the Royal official system altogether.

Out of the Officials, lay and ecclesiastical, and the Manorial Lords, the Assemblies were constituted. It is true that nominally every free Frank was entitled to appear, but the number of free Franks who were not Manorial Lords or Officials was not, at this time, very considerable. I should say that, at this time, at least nineteen-twentieths of the population were slaves or dependants and that this proportion was rapidly increasing from year to year through the increased pressure of the military service upon the common freemen. They were being driven thereby to give up their little estates to some Manorial Lord or Bishop, and receive them back in possession only as the tenants of the Lord or Bishop to whom they had commended themselves, losing thereby their full freedom but escaping military duty.

Practically the Assemblies consisted of the elements above mentioned and sometimes only of the more important men among these; and since the Manorial Lords were in a certain sense Officials, as well as the Bishops, we may say broadly that these bodies were the Emperor's Officials gathered around him for the purpose of informing him of the condition of things in all parts of the Empire, counselling him as to measures and receiving his commands. They were not legislative bodies in any true sense of the word. They were rather the appointed Councils of the Emperor. They were held for the whole Empire and for the different parts or districts of it and they were called by the Emperor himself or by some Official authorized by the Emperor to hold them. The Emperor himself presided over the Imperial Assemblies, *i. e.*, those representing the entire Empire and presented the business for them. After obtaining their advice, the Emperor decreed the measures of law. These were written down by the scribes, usually clergymen,

and proclaimed by the Emperor as law. They were entitled Capitularies, and we have collections of them which give the best idea we can get of the nature of the Imperial legislative system. They manifest, in the first place, that the Emperor was the supreme and exclusive lawgiver and that the Assemblies of his own Officials were only his advisers. They show, in the second place, that the Emperor's legislative power was entirely unlimited and that, although there were bodies of law, both German and Roman, extant and applied, they were so by Imperial permission and could be changed or abolished by the Emperor at pleasure. And they demonstrate, lastly, that there was as yet no dual or federal system of legislation or of Government in the Empire, since they cover every possible subject from the organization of the Army to the price of commodities. The sovereign Emperor could only be limited in his Government by himself and self-limitation is no limitation in the theory of political science.

It would appear from this brief survey of the Carolingian Imperial system that in it Liberty had been, in principle at least, entirely sacrificed to Government, and that the problem, which we are considering, of the reconciliation of Government with Liberty, was not treated by it as having any existence. This is not, however, strictly true. In the first place, the Church was now, under its hierarchic organization, more than ever before able to protect the Individual against the arbitrariness of Government. It still maintained all of its rights and powers in the state as fixed under the Roman Imperial Constitution. First, the right of intervening between the Government and the subject when appealed to by the subject for protection against the arbitrariness of Government. This power was exercised by every Church Official and did not require action

by the whole Church or any division of it. Such slow and clumsy procedure would have defeated the purpose of the power. This was well understood by the Bishops and they never allowed themselves to acknowledge any such requirement, if the Government ever attempted to make it. Second, the power of according protection from the Government to all persons seeking the asylum of the Churches. This was a very effective limitation upon the arbitrariness of Government and was often resisted by ruthless governmental Officials, but the Bishops insisted upon exercising this power, often at the risk of their own lives, and did so successfully. Thirdly, the control by the Church of the domestic side of life, marriage, divorce, baptism, burial, education, care of the poor and the sick, was maintained and exercised through the more voluntary methods of religion, instead of through the physical power of Government.

If the Church of the Carolingian Empire had been confined to the exercise of these powers, it would have been a capital defense against the arbitrariness of Government, but for good or for evil such was not the case. The gift of vast estates to the Bishops by the Kings, estates inhabited and cultivated by a large population of slaves and dependants, and the exemption of these estates from the jurisdiction of the Royal Officials, resulting in the exercise of all the powers of secular Government by the Bishops over them, which situation the King or the Emperor endeavored to meet and control by appointing laymen to Bishop's seats, who lived the lives of worldlings, oppressed the inhabitants of the estates, and scandalized morals and civilization, all this degraded the Church from its high position as defender of the civil rights of the people against governmental arbitrariness and despotism and made of its high officials themselves oppressors of the helpless and needy.

Still this was not yet universally the situation. Among the Bishops and especially among the Monastic Clergy were very many genuine Priests of devout Christian character who held high the torch of Christian civilization and protected the people against the oppression of the semi-barbaric secular Lords and Officials. The Church was still a mighty defender of the Civil Liberty of the people. How the people of Europe in the centuries between the first and the sixteenth would have fared without its protecting and civilizing lead, God himself only knows.

Charlemagne established, however, another institution as a regular part of the secular Constitution of the Empire with the direct purpose of preventing both the secular Officials and the Ecclesiastics from oppressing the common subject, this was the institution of the Missi Dominici. It had been the custom even of the Merwings to send, in an irregular way, special agents into the different districts of the Kingdom in order to inform themselves of the condition, needs, and wishes of the subjects and of the conduct of the Officials. It was Charlemagne, however, who made the irregular custom a regular continuous practise as the most important part of the Constitution and the administration. As a rule the Emperor appointed two Missi for each Archdiocese of the Empire, one an Ecclesiastic and the other a layman, neither of them being an inhabitant of the district in which he functioned, and having a term of a single year. The purpose of such qualifications and limitations was, it is quite evident, to secure able, honest, and impartial action on the part of the Missi. Besides the duty of reporting to the Emperor, as in the time of the Merwings and the first Carolings, the conditions obtaining in the different parts of the Empire, they were vested with two most highly important powers. The first

was the superior control of the administration. The Counts, Bishops, Abbots, and all other Officials within the district assigned to a pair of Missi, were held to give strict account of their doings to the Missi and render obedience to their directions. Inasmuch as the Counts, Bishops, and Abbots held their offices for life, they were continually accumulating property and powers, which tended always to a local autonomy in their hands. It was the duty of the Missi to look after and prevent this exaggeration of power in the hands of the regular Officials, both lay and ecclesiastical. Especially were the Missi commissioned with the duty of preventing the Officials from transforming the royal benefices into their own property. Their duty was the same over against the Manorial Lords who held Royal benefices. These were especially prone to absorb the Royal benefices into their allodial estates. Still further, it was the function of the Missi to hold the freemen to the discharge of their military duty and to prevent them from escaping it by commending themselves to the protection of some Manorial Lord, Bishop, or Abbot, or to the private protection of a secular Official, thus giving the fee of their land to the protector and retaining only the possession and use. This was a most onerous duty and one which the Missi found most difficult to discharge. But the duty of greatest importance to us, in this study, with which the Missi were charged was that of protecting the common subject, especially the poor and defenseless, such as widows and orphans, from the arbitrariness of the governmental Officials, the Bishops and Abbots and even the Manorial Lords. They were authorized to hold Courts and Assemblies of a judicial nature and to hear all complaints against those in authority and to determine whether the acts complained of were unlawful stretches of power or inequitable or too strenuous

exercises of lawful power, and to give relief against all such. They were also charged to exhort both subjects and those in authority to live according to the golden rule of morals and to remember that governmental power must always be supplemented by Christian conscience and character in order to work out the ends of civilization. If we should regard the Emperor simply as the Sovereign, and the Counts, Bishops, Abbots, and Manorial Lords, separately and in assembly, as the Government, charged with the execution of the powers vested in them by the Sovereign, and the Missi as supreme Judges authorized by the Sovereign to interpret finally the extent of the powers of the Government and of the Liberties of the subject and to protect the latter against the former in the enjoyment of their Liberties as well as defend the Sovereign against the usurpations of the Government, then would we have here, indeed, a most intelligible attempt to solve our problem of the reconciliation of Government with Liberty. There is not much doubt that this was the thought of the great Emperor and of the Teachers in his school of Political Science at Aachen. His Imperial system was working out in this way and had there been three such successors to Charles as his three predecessors, it would have become the well understood system of the European Empire and we cannot but believe would have given the Middle Ages a profoundly different turn. But this was not to be and things which looked so fair and promised such logical arrangement and results in 810 were destined to be plunged into confusion dire again in 820, to overcome which cost centuries of thought and labor.

CHAPTER VI

THE ANGLO-SAXON STATE

We have in the first century and a half of the development of the Teutonic state on British soil the very best possible example of what the ancient German political system could do in the reconciliation of Government and Liberty. This development was wrought by the purest of the German tribes, the Angles, the Jutes, and the Saxons, all of whom immigrated into the British Island before they had become modified in the slightest degree by contact with the civilization of the Roman Empire and of the Christian Church, and who amalgamated neither in blood nor ideas with the populations they found upon the soil of their newly conquested home, but drove them back toward the north and west and settled themselves upon practically uninhabited territory. They had a clear field upon which to work out their public polity in the new land. We have already seen what that system was in the original home. The outline of it, we know, was the free family with its hide of land, subject to the almost despotic rule of the house father; the union of these house fathers into the Assemblies of the village, the hundred, and the tribe, as the basis of all Government, as the electoral colleges for all Officials, and as the Legislatures and the Courts; the choice by these of the Mayors of the villages, the Princes of the hundreds, and the Chiefs of the tribes; and their participation in the Government with these elected Officials, except in time of war or migration when they elected temporary military Leaders, Dukes, and laid all power in their

hands during the period of the movement. This was in brief the Constitution which the Jutes, the Angles, and the Saxons brought to the British Island in the fifth century of the Christian era.

They came, naturally, under the command of their tribal Chieftains, their Dukes, or Earldormen, as they were generally called, and they brought with them their women, their children, their dependants and slaves, their cattle and other animals, and goods and chattels of every description. As tribes they settled down upon the land, dividing the territory occupied by the tribe into hundreds and villages, and parcelling out the land as was the custom in the old Germanic home. They established the village Assembly as chief police organization, the hundred Assembly as chief judicial organization, and the tribe or shire Assembly as chief legislative organization and ultimate authority in the entire system. They elected their police Magistrates, their Princes or hundred men, and their Earldormen in these several Assemblies of the freemen and they had no priesthood or religion which placed any restraint upon their political actions.

At the outset, Government was in the hands of these elected Officials, whose terms were either for life or for an indefinite period; and while the Assemblies participated to a limited degree in the exercise of governmental power, they acted chiefly as restraints upon that power as exercised by the Officials. At the outset, also, each tribe had its own independent organization and, when it settled down upon the new territory, founded an independent state, the Chief of which was its own Earldorman or Duke, and who in a very short period of time became its King or something like it.

During the first hundred and fifty years after the begin-

ning of the conquest the many petty Kingdoms were generally united or merged into larger ones until, finally, just before the end of the sixth century, seven stood as independent of each other, although acknowledging, from time to time, the King of one of them as a quasi-head of all under the title of Bretwalda.

It is, however, the internal transformations which took place in these seven states during this period which is the thing of chief interest to us in this study. These transformations, in so far as they relate to the subject which we are treating, concern chiefly the altered character and purposes of the tribal and hundred Assemblies and of the Kingship itself.

The Kingship had now everywhere taken the place of the Dukeship or Earldormanship of the invading tribes. The principle of its title had now become election by the Assembly of the freemen of the Kingdom from among the male members of the Royal race, the Assembly exercising the authority to select the most capable one of this race or family, according to its own judgment. The Royal families were the families of the Dukes or Earldormen of the tribes who led the tribes respectively in the conquest and migration and each of these claimed descent from the heathen God Wodan. The powers of these Kings were limited only by the participation of the Assemblies of the freemen of the Kingdoms in their Government. The merging of the original Kingdoms, however, into the seven larger states left the original Kings of these smaller mediatized Kingdoms as Under-Kings or Earldormen of the divisions or shires territorially corresponding to these original Kingdoms. These Under-Kings, or Earldormen, at first selected by the Assemblies of the freemen of their original Kingdoms from among the male members of their respec-

tive families, came, after the consolidation of the smaller to form the larger Kingdoms, to be chosen by the Assemblies of these larger Kingdoms, while the Assemblies of their original Kingdoms became the shire-moots of the shires over which they now acted as local Governors. Regarding the Assemblies of the freemen in these larger Kingdoms as the constitutional basis of the Government, rather than as a part of the Government, we have in this arrangement a sort of constitutional self-Government in the shires of these respective Kingdoms, which might serve to limit, practically, the Royal central Government. If these Assemblies had maintained this character and composition, they might also have been the basis of a constitutional Individual Liberty and might have constructed organs to guarantee and safeguard such a realm against the absoluteness or arbitrariness of the Royal Government, but it was exactly the change in the composition and character of these Assemblies which frustrated all this, and spoiled the fair beginning. The celebrated English historian of the period of the Norman Conquest somewhere says in substance that when the Assembly of a country of any considerable size is primary, instead of representative, it always becomes oligarchic and the more democratic its original constitution the more surely will this result follow. This was certainly the case with the Assemblies of the freemen of the seven English Kingdoms of Kent, Essex, Sussex, Wessex, East Anglia, Northumberland, and Mercia. The common freemen, except those dwelling about the usual place of meeting, would not attend. Distance and lack of time as well as growing indifference precluded it. Only the more important personages appeared, the Earldormen of the shires and the larger landowners.

Soon a new element appeared. Each King began to create around his Court a personal following, a body-guard so to speak, for the protection of his person, for the execution of his powers, and for a military staff for the popular militia, the freemen of the Kingdom in arms. These were the King's Theyns. Some of them the King endowed with land, others not, but he was the personal lord of them all as well as King in the old sense of leader of the people. This element now appears in the general Assemblies of the different Kingdoms. It is an element created by the King himself, by his own appointment and dependent on his will. With this, these general Assemblies of the Kingdom became Assemblies of the Earldormen, the King's Theyns and the few freemen residing around the place of assembly, and perhaps a few of the large holders of land without office from a distance. They were now called Witenagemots, the Assemblies of the wise men, instead of the Assemblies of the whole body of freemen of the Kingdom. In them the King's Theyns soon outnumbered all the other elements taken together and the acts of these bodies became thus the acts of the King's own personal following.

The character as well as the composition of these bodies also underwent a very important change. Instead of maintaining the position of national constitutional Conventions, so to speak, they became now mere governmental Councils of the Kings, a part of the Government, a part too only advisory and without independent authority. Changes of a somewhat similar nature took place in the character and composition of the shire-moots, the Assemblies of the freemen of the original Kingdoms. The freemen as a whole ceased to attend these also, and instead thereof a small number of them were required by the Earldorman to be present and to act as his assessors in judicial contro-

versies chiefly. Only in the Assemblies of the village communities did the body of the common freemen continue to serve and act and these Assemblies were too small and unconnected to exercise any important limitations upon the Royal power, which was now, under the new conditions and changes, fast developing into an absolute power, with no constitutional limitations in behalf of Individual Liberty.

Happily for later England, at the very moment when the development of the absolute Kingship in the Anglo-Saxon state threatened to obliterate constitutional Individual Liberty from the system, an event of mighty importance happened, the effect of which was to infuse a new morality and a renewed Individual Liberty into the public polity, and into individual and family life. It was the conversion of the Anglo-Saxon Kingdoms, or rather the populations thereof, to Christianity, the Roman Church Christianity. At the close of the sixth century the Bishop of Rome, Gregory the Great, sent Augustine and his Monks to England for the conversion of the Anglo-Saxons from their heathenism. The Christian Church had, it is well known, been introduced into Britain during the period of the occupation of the Island by the Roman Empire and the Celtic subjects had embraced the Christian religion, but when in the fifth century the Roman legions and the Roman Government were withdrawn from Britain and when the east, middle, and south of the Island were occupied by the Jutes, Angles, and Saxons, exterminating or driving back the Celts into the west and north, these conquested parts lapsed again into heathenism and broke off all connection with the civilized world either political or religious. During the entire sixth century Britain was as completely out of the world as it had been before it was occupied by the Roman Empire.

The conversion of the Anglo-Saxons began in Kent and proceeded chiefly from Kent to the other Kingdoms. Naturally, the capital, so to speak, of the English Church was laid in Kent. The conversion proceeded peaceably and gradually, beginning with the Kings and those in highest station and advancing through all classes of the society. The Christian religion was not forced upon any one in England. It won its way by persuasion, influence, and example, but the conversion was all the more complete, universal, and abiding for that. Its progress occupied almost the entire century between the close of the sixth and that of the seventh.

At the end of the seventh century the Church was organized in hierarchic form throughout the seven Kingdoms. It exercised all of the functions here accorded to it by the Roman Imperial system. It looked after the worship, the morals, the education, and the domestic life of the people. It cared for the sick, the infirm, and the poor. It cultivated the æsthetic sense. It developed the sense of justice and softened the antagonisms between the different classes in the society. It furnished an asylum for the persecuted and the oppressed, and it interceded with the secular powers in behalf of the weak and helpless. In England as elsewhere it was from this time forward the organized safeguard of Individual Liberty against despotic and arbitrary Government.

But the Church as hierarchically organized, at the end of the seventh century, did still more, much more, for the Anglo-Saxon state. It made the English nation. It made the Kingdom of England and it made the Cerdics Kings of England, instead of Kings of Wessex. In the diversity of secular Government and law, it was the Church which possessed unity of faith, unity of morals, unity of custom, and unity of Government throughout the seven Kingdoms.

The Clergy of the Church throughout the seven Kingdoms were united in general Synod for all England and the Archbishop of Canterbury was the Primate of the Church in all the Kingdoms. It was above all things the teaching and the influence of the Church which created a national consensus of opinion and a popular desire for national unity in England. In this period of English history the Church followed a national unifying policy and paved the way thereby for political union and national development.

Moreover, at the same time that the Church defended the Individual against the arbitrary power of the Kings, it gave the Kings a more solid basis for their legitimate authority and power. The English Church of this period maintained the principle of rendering to Cæsar the things which rightfully belonged to Cæsar. It gave its consecration to the Royal power. It made the obedience of the subject to the King and his loyalty to the King a religious duty, always, of course, under those limitations fixed by the Church in behalf of Individual Liberty and worth. And, lastly, it was the Church again which brought the Anglo-Saxon state into the orbit of the civilized world.

It would be difficult indeed for us of the present day, with our modern way of thinking, to sufficiently appreciate what all this meant for England and the development of the English nation. We are all the time thinking of the state as the broader, more national organization of the people and of the Church as only one of the many institutions embraced in it, whereas the English Church of the seventh century was the one national organization of the people on English soil and the Kingly Governments, separate, based on family right and the choice of the Witen, the majority of whom in every case were the King's own Theyns, rested upon a far narrower foundation.

These things are, however, somewhat aside from the purposes of this study. It is the Church as the defender of the Liberty of the Individual against the despotic and arbitrary encroachments of the Royal Governments in the England of the seventh, eighth, and ninth centuries which interests us. Of this the Church was, at the outset, the sturdy and practically sufficient defender. But, alas, it did not remain such. It soon became mixed and mingled with the secular Government in the same way as, at the same period, upon the European Continent. The Church became a corporation holding vast landed estates and governing locally the peasantry which worked them. The Bishop sat with the Earldorman in the shire-moot and participated in the judicial administration of the shire. The Bishops of the Kingdoms sat also in the Witenagemot as the King's Counsellors in secular as well as spiritual affairs and participated in the choice of the Earldormen, the Bishops, and the King himself. We have historical record that they acted sometimes as Chieftains of the armed hosts in war. The Church ceased thus very soon to be an organization separate from, and independent of, the Government, whose interests would lay with the subject rather than with the Government and whose great political duty would be felt by it to be the protection of the subject against the despotism and arbitrariness of Government, and became a quasi-governmental institution having its own subjects as well as votaries and having in many respects common interests with the Royal Government.

With this the Anglo-Saxon state swung back into the position of a benevolent despotism in principle. In practise, the participation of the Earldormen, Bishops, Royal Theyns, and larger landholders in the Assemblies and the possible participation of all freemen therein served to limit,

in some degree, the power of the King, especially over the members of the higher classes in the society. It did not, however, always serve to limit the despotism of the Government as a whole. It could never do so, when the Government as a whole was disposed to exercise despotic power, and this, with some notable interruptions, has been the nature of the much-vaunted English Liberty to this day.

After the union of the seven Kingdoms under the rule of the house of Wessex, King Alfred, who was a statesman of the order of Charlemagne, and who had, undoubtedly, an extensive knowledge of the Carolingian Constitution, conceived a system for England quite similar to that invented or developed by the Great Caroling. King Alfred evidently regarded his sovereign authority as the basis of the Individual Liberty of his subjects as well as of his Government over them. It was in this conception rather than in anything and everything else that his superior statesmanship manifested itself. At the same time that he perfected his governmental arrangements, he adopted the institution of the Carolingian Missi, under the name of Fideles, for England and vested in these circuit Judges, so to speak, consisting of both laymen and churchmen, the power and imposed upon them the duty of protecting the constitutional or customary Liberty of the Individual against the arbitrary power of the governmental Officials. Exactly how far their power extended is difficult to tell. It seems, however, that they could nullify everything short of the King's edicts issuing from the Witenagemot and his express administrative commands. Here was, however, the weak spot. A King like Alfred might distinguish between his power as Sovereign and his power as Government and defend the Liberty of the Individual against the latter while holding it subject to the former, but the ordinary Monarch

could or would never do any such thing. In such a connection the Government of the ordinary monarch will always become, both in principle and practise, despotic. Naturally, this system of the Fideles disappeared with the Great King who adopted it.

The Danish invasions which began before the reign of Alfred, that is before the last quarter of the ninth century, and extended through the tenth, ending with the temporary conquest of all England by the Danes and the temporary reign of the Danish Royal House, did not alter materially the constitutional situation in regard to the subject we are considering. The Danes were so akin to the Jutes, Angles, and Saxons in race and civilization that they readily adopted the Anglo-Saxon institutions and customs in England, even embracing the Christian religion and acknowledging and protecting the English Church with its existing organization.

The two chief results of the Danish invasions and the short reign of the Danish Royal House were, first, the increase of the personal following of the King. In resisting the Danish incursions the house of Wessex, the Cerdics, found their opportunity for expanding Wessex until it became England. The smaller Kingdoms of Kent, Essex, Sussex, and East Anglia were unable to defend themselves and were obliged to lean upon Wessex, with all which that implies. Moreover, the Danes were, at the outset of the invasion, still heathen, and the Church throughout these weaker Kingdoms in the East looked to Wessex for protection. As Wessex grew thus into England through military and ecclesiastical causes, the Kingship of Wessex grew stronger and more stable as well as more universal. The body of King's Theyns grew immensely, this body of important men attached to the King by personal ties and

pledged to him in superior loyalty. In other words, the relation of Lord and Vassal supplanted that of Sovereign and Subject in regard to an important part of the membership of the state. This fact is connected with the topic of this treatise in that the Theyns were members, and ever-present members, of the Witenagemot and majorized the other, only a little more independent, elements therein. The protection of Individual Liberty through the participation of the subject in the Government, through Self-Government, became thus entirely lost, as the decrees of the Witenagemot, voted by the Theyns, were, virtually, the decrees of the King himself. This had, however, substantially happened before the Danish invasion began.

The second result of the Danish supremacy was purely administrative. The Danish Kings divided England into four great Earldoms, East Anglia, Wessex, Mercia, and Northumberland, and placed an Earl or a sort of Viceroy over each, that is, they interposed a set of administrative Officials between the Earldormen of the shires and the King. The effect of this was rather to weaken the Kingship by the creation of such powerful local rulers over such large territories and populations, and to train up personalities, who might become candidates, so to speak, for the Royal office. It will be remembered that Godwin, King Harold's father, was the Earl of Wessex, but was not of the house of Cerdic. The restoration of the Wessex house in 1041 brought no change in the Constitution concerning our subject of discussion; but the transfer of the Royal power from West-Saxon to Dane, and from Dane to West-Saxon, and from the Cerdics to the Godwins, had demoralized the Royal tenure and opened the way for the Norman Conquest.

Anglo-Saxon Liberty is thus seen to signify political rather than civil Liberty, the joint liberty, so to speak, of

the subjects of Government to participate in the operations of Government, rather than a sphere of Individual Immunity from Government, protected by an organized power. The Government as a whole was unlimited and the Immunity of the Individual from governmental power in any respect depended simply upon the benevolent disposition of the Government itself, and not upon a sovereign power back of the Government placing limits upon the powers of the Government and furnishing the means for their enforcement. This is certainly a rude and unsatisfactory solution of our problem, if indeed, any solution at all. We must look further, much further, for that solution both in English history as well as elsewhere in Europe and perhaps we shall not find it there at all.

CHAPTER VII

THE MIDDLE AGES

It is very difficult, not to say impossible, to give a distinct date to the beginning or the end of the Middle Ages, nor is it for the purposes of this study necessary. We are dealing with institutions rather than with chronology. From this point of view, we may define the Middle Ages as that period in the development of the civilization of Europe, when the Feudal System and the Roman Church dominated the Monarchy and the people, and when the method of thought in every direction was theological. All the terms of this definition require considerable explanation.

First, what was the Feudal System?

What it was can be best understood by a brief historical survey of its origin and growth. It must be always kept in mind that the Roman Empire was a vast union of cities, originally independent of each other and sovereign and then reduced by the Constitution of the Empire to the position of local administrative bodies, municipalities, the Imperial Governments having assumed the sovereignty and the political power for the whole. It must be likewise kept in mind that the old Germanic state was rural, agricultural, and pastoral and that no cities existed among the ancient Germans, and lastly, it must be kept in mind that when the Germanic tribes overran the Romanic lands, they brought with them their aversion to city life and that when they settled down territorially, they did so outside of the limits of the towns upon the open country and returned to agricultural life.

A vast quantity of the land of the Roman provinces had never been reduced to cultivation or even to private ownership. It was Imperial domain. The German tribes occupied it and it was, as we have seen, parcelled out among the Chiefs and their followers. The tenure of such land was what we call allodial. It was even a freer tenure than our allodial tenure, since no relation whatsoever to the state or its head was established by it. It was this kind of tenure which exhausted the domain of the Merwings and led to their impoverishment and downfall. The Carolings profited by this experience. When they gave land out of the Royal domain they required some kind of continuous service for it and limited the time of holding it to the lifetime of the immediate recipient. The Bishops of the Church and the large landholders had already set the example for this in the granting of benefices, as it was called, or the leasing of land. As the Royal power grew weaker, the Bishops and the large secular Landlords were able to induce a larger and larger proportion of the smaller landholders to accept their protection and pay for the same by giving up the fee of their lands, as we would say, but retaining the possession and use of them, rendering some service or tribute, great or small, in recognition of the Lord's ownership. The possessors of such lands, having been the original owners in full, claimed the right of transmitting this possession to their heirs, and this right was acknowledged by the Lords from the first. Step by step all the land in a locality was brought into this relation to the chief Landowner in the locality, and all Europe was divided up territorially into these large landed estates, each the property of some secular or ecclesiastical personage. The estate of a great Landlord consisted thus partly of land which he held both in ownership and possession and

worked by his own peasants and slaves, partly of land which he owned, but the possession of which was held for life by another as benefice, and partly of land which he owned, but the possession of which was held by another and transmissible to his heirs, since it was originally owned by the beneficiary and transferred by him to the Lord in order to secure protection for his possession and use of it.

Again, estates in land were connected with the offices of the Crown as salary, so to speak, for the Officials. The Counts especially were compensated in this way. They worked estates, in part by slaves and peasants and gave them out in part as benefices, receiving certain services or tribute in return. They also increased their estates by according special protection to the small landowners around them and obtaining for such protection the fee, as we would say, of these lands, the original owners retaining the possession and use of them, and paying service or tribute, generally of a light nature. The lands thus acquired by the Counts were their own private property and not a part of the official estate held of the King as salary of office. These lands, however, soon exceeded in extent the official estates and the Counts finally succeeded in making not only their official estates, but also their offices hereditary, that is, succeeded in transforming office and the salary of office into private property. With such official and property power they then sought to impose upon all the other Landlords of the county the fiction that they held their estates as fiefs of the Count and succeeded in doing so in greater or less measure.

Then the Dukes and Margraves, where such existed, sought to bring the Counts and all the other Landlords not subject to the Counts into the relation of Under-Lords of the soil to them. Finally the Kings sought to establish

the like immediate relation between themselves and the Dukes, Margraves, unmediatized Counts, and independent Landlords. The success in both of these cases was only partial and the bond of connection was weak and attenuated. Gradually but surely this relation of Lords of the soil and Vassals, mediated chiefly through the holding of land by the latter from the former, was substituted for the older relation of Sovereign and Subject.

At last the Lords of the soil, both those who held of greater Lords and those who held of the Kings, claimed and maintained immunity in their estates against the regular Officials of the Kings, *i. e.*, they claimed what was called independent Manorial jurisdiction over the inhabitants of their several estates. In this way the Royal official administrative divisions were broken through and destroyed by the lines of the Manorial estates. The lines of these estates became now the local governmental boundaries, and these Manorial jurisdictions became more than local Governments in most cases, and, in some cases, became the lines of general Government and, practically, of sovereignty.

Such was the result of the first attempt to organize Government for the country as distinguished from the city. Everywhere rose the castles and strongholds, inhabited by the Lords of the soil and their families, domestic servants, and personal attendants, around which, usually at the foot of the eminence upon which the castle stood, were the villages of peasants and serfs, who worked the lands of the Lord not given in fief to Vassals. Farther out lay these fiefs. In this manner the soil was brought under cultivation, the cultivators protected and governed, and the products of husbandry secured against pillage and theft. Agriculture grew rapidly to be the predominating factor

in the economy of the state, and the Landlord became the chief power in the state.

But let us examine, in the second place, the effect of this development upon the Monarchy. Charlemagne transmitted the Monarchy, intact and strong, to his only surviving son Louis, called the Pious, in 814. Eight years before his death he had bestowed Kingdoms on his three sons, Charles, Pippin, and Louis, without making any provision about the succession to the Imperial office. The death of Charles and Pippin before his own restored the unity of the entire Empire in the hands of Louis, except Italy where Bernhard, Pippin's son, had by permission of Charlemagne succeeded his father.

From the first day of the reign of Louis the Pious the relation to Bernhard and Italy was the weak spot in the new Emperor-King's administration. Bernhard's idea was that he was entirely independent of Louis's Government, while Louis rightly conceived that as Emperor he was Bernhard's sovereign. In 817 Louis made his first disposition of the succession. He designated his eldest son, Lothair, as his successor to the Imperial office and as immediate ruler or King over the larger part of the Empire. He gave Aquitania as a Kingdom to Pippin and Bavaria to Louis, leaving Bernhard in Italy, all these to be subject in some sense to the Imperial sovereignty of Lothair. This was a statesmanlike conception, but it did not suit the wishes of Pippin or Louis or Bernhard. Moreover, the Emperor Louis the Pious married a second wife, who bore him a son Charles, named the Bald, for whom the Emperor modified the arrangement of 817, in order to construct another Kingdom, over which Charles should reign. This furnished a new source of discord. Insurrection after insurrection against the Emperor by his sons hastened his

death in 840 and led to the overthrow of the Imperial system of Charlemagne altogether and to the division of the Empire into the Kingdoms of West Francia or France, East Francia or Germany, and Italy. This was consummated in final form by the compact of Mersen in 870, between Louis the German King of East Francia and Charles the Bald, King of West Francia, leaving Louis II, son of Lothair, as King of Italy.

The members of the Carolingian House were now in constant war with each other and they were obliged thus to recruit and hold large bodies of armed men and provide for their sustenance. In almost all cases this was paid for by new grants of lands out of the Royal domains in fief, or by increasing the privileges and immunities attached to fiefs already granted.

In the year 888 the Carolingian dynasty became extinct in Italy, in 911 in East Francia or Germany, and 986 in West Francia or France. In each of these Kingdoms the sovereignty now passed to the aristocracy of the great Feudatories, and the immediate problem for these was now whether to leave the thrones unoccupied and themselves govern in entire independence, each in his own estate, or to choose a new King. The conditions and ideas of the time favored the latter course. The Saracen invasions from the South, the Northmen invasions from the North, the internal strife over rights and possessions, the necessity of having a logical and moral basis for the feudal properties, powers, immunities, and privileges, all pointed to the organization of the great Feudatories and their choice of a new representative of unity, a visible basis of title and authority.

The great Feudatories of Italy chose Beringer, Duke of Friaul, those of Germany chose Conrad, Duke of Fran-

conia, and those of France chose Hugh Capet, Duke of the Isle of France. Naturally they imposed upon the new Kings limitations, the chief of which were the recognition of the hereditary tenure of their estates and offices and of their local governmental powers within their estates and districts.

The new Monarchy was now distinct from the old in many respects. It did not have the sovereignty; that was in the body of the Feudatories. The form of state was now aristocratic. The new Monarchy was indivisible. It was not family property. It was clearly office. The new Monarchy was not heritable. The incumbent held for a term, not longer than his own life, and might be deposed by the body which chose him. Lastly, the new Monarchy was strictly limited and moved within narrow bounds. The new King was thus the territorial Lord-in-Chief of a body of Feudatories, related to them not as Sovereign to Subject, but as Lord to Vassal, the terms of the relation being defined by the compact or contract in the grant of the fief on condition of service or tribute, or both, and by the so-called Electoral Capitulation imposed by the body of Feudatories at the coronation, and he was cut off by the Feudatories from any direct relation to the great mass of the population who lived as subvassals, serfs, or slaves to them. The powers of the King were reduced thus to a minimum, and the Liberty of the Feudatories was expanded to a maximum. It was so excessive as to threaten anarchy all along the line, while the great mass of the population were subject to the unlimited Government over them of the Lords of the soil.

The King, it is true, also held vast estates worked by serfs and slaves, and here he governed without limitations, while outside of these districts his Government was almost

non-existent. His Counts and other Officials had become Feudal Lords, holding their offices as well as the estates attached to them as family property, to be transmitted to their heirs. They felt their interests to be with the Feudatories rather than with the King.

In England feudalism did not reach the excess of political decentralization attained on the Continent. The Duke of Normandy, one of the strongest and most defiant Vassals of the King of France, had been eye-witness to, and participant in, the weakening of the Monarchy in France and elsewhere on the Continent and when in 1067 he became King of England he imposed such modifications upon the system as would safeguard the Crown against this fate. It cannot be said that Duke William introduced the Feudal System into England. As we have seen, it had made a very considerable development under the Anglo-Saxon Kings, and was in Anglo-Saxon England of the same threatening character to the Monarchy as upon the Continent. Duke William or King William, by assuming all the folkland of England as King's land, as well as the estates of the Anglo-Saxon Kings, and by confiscating the estates of all of the Anglo-Saxon Lords who had opposed his claim to the Crown of England, held as immediate Landlord about all the land of England, except what was in the hands of the Church. He then bestowed this land as fief upon his Norman followers chiefly, permitting them, it is true, to subinfeudate their estates, but requiring of every sub-Vassal, as well as of every immediate Vassal, the oath of primary loyalty to himself. Finally, he maintained, as Sovereign over Subjects, as King in the original sense, an official system separate from, and independent of, the Feudatories, the County Sheriff system, and broke up the great Earldoms of the Anglo-Saxon period into Counties.

He was thus immediate Feudal Lord of the most of England and thereto exercised the Royal powers of Sovereign over Subject. This maintained the unity of England during the Feudal period, while anarchy, or something very like it, prevailed on the Continent. When the Barons of England successfully defied their King under the reign of the weak John, they did so as a united organized body, claiming to represent the whole body of subjects, and the Charter which they extorted from him was for the benefit of all freemen in England. They also selected a Standing Committee of the strongest and most intelligent among themselves and vested it with the power and imposed upon it the duty of holding the King to his promises. So long as this Committee remained extra-governmental, England had a constitutional guarantee of Individual Liberty; when, however, the Lords assumed the legislative power of Government, the Individual had nowhere any guarantee against the whole Government in the enjoyment of that Liberty.

In order to complete the picture of the Middle Ages, however, we must now follow the ecclesiastical development from the death of Charlemagne to the completion of the Papal system of the Church.

As we have seen, the Church in the time of the Great Emperor had reached the condition of complete hierarchic organization under the headship of the Bishop-Patriarch of Rome. Even before the downfall of the West Roman Empire, the laymen had lost their early right of participation in the choice of the Clergy, and the Clergy had become a separate and independent body, cooptating themselves, educating themselves, and investing themselves with office and power, the lower Clergy electing the Bishops and the Bishops appointing the lower Clergy.

When the Barbarians overran the Empire they found the Church, thus, so compactly and independently organized that the destruction of the Empire did not involve the destruction of the Church as one of its institutions. More than that, the Church was prepared, under its independent hierarchic organization, to bring the Barbarians, through the form of conversion at least, under its great moral and disciplinary power and influence. In the centuries after the fifth, the world-historic meaning of the change from the democratic Church of the Apostolic era to the hierarchic Church of the fifth century became manifest. Under the original form of organization the Church could never have done its great work in subduing and disciplining morally the Barbarians. On the other hand, they would have ruthlessly trampled it underfoot. In the fierce struggle with the paganism of the Teutons nothing but its independent hierarchic organization could have brought it victoriously through, and after it had triumphed over Teutonic paganism nothing short of this organization could have preserved the Church against the Arianism of the new converts. However much we may deplore the loss of the original democratic organization of the Christian Church and the participation of the layman in its Government, still we must say that the change was historically justified. So far as mortal eye can see Christianity would have gone down with the Roman Empire except for the compact, hierarchic, independent organization effected chiefly by Bishop Cyprian in the third century of its existence. We are also obliged to admit that the demoralization of the Church under its Episcopal organization in the Merovingian Kingdom, when the Frankish Bishops became almost indistinguishable from the Lay-Lords of the Manors, justified, yes required, the creation of the Archiepiscopal or-

ganization and the Monastic orders, chiefly the Benedictine order, under the control of the Bishop of Rome, in order to re-establish a stronger unity in the Church and purify the Clergy of their worldly character and practises. As we know, the Carolingian Kings and the great Emperor himself approved all this as in the interest of general civilization and we Protestants only show our misunderstanding of the necessities of the time when we condemn it. We know, still further, that the Bishop of Rome and his Archbishops and Monastics were the chief power in setting the Carolings upon the Frankish throne and upon the throne of the Holy Roman Empire, and that it was the Carolings themselves who created the temporal power of the Bishop over the Exarchate of Ravenna, the so-called States of the Church.

It cannot be said that during the lifetime of Charlemagne the Bishop of Rome was the Sovereign of the Exarchate. The Emperor considered himself alone the Sovereign there as elsewhere in the Empire. The Emperor looked upon the States of the Church as he did upon the Dukedom of Benevent, as a sort of local Government within his sovereignty, or as a fief of the Empire, but never as an independent state. I do not think it could be said that the Bishop of Rome himself, at that time, claimed that he was independent of the sovereignty of the Emperor. The Bishop of Rome followed an Imperial policy during the reign of Charlemagne, not a states'-rights policy, as we would say. He continued to follow this Imperial policy during the reign of Louis the Pious and also in the reign of Lothair I, until Lothair himself showed himself untrue to the Church by promising the Saxons to allow them to restore their ancient heathenism. Then the Roman See and the entire Clergy turned against Lothair and the Empire and em-

braced that states'-rights policy which characterized the Church throughout the entire Middle Ages.

It must be always understood that this states'-rights policy applied only to the secular Government. The Church itself became in its own organization imperialistic. The Church undertook to supplant the Empire as representing the unity of Europe. The Church organization passed, after the downfall of the Carolingian Empire, into the stage of the Papacy of Rome. Nor was this less a necessity of the times than was the independent hierarchic organization of the preceding period. It was necessary to civilization to preserve the unity of Europe, especially of Christian Europe. The secular power had shown itself incapable of doing it. The Church must do it, if it was to be done at all. It was also necessary that the head of the Church should be exempt from the sovereignty of any barbaric secular Prince, such as Lothair or any of the whole race of them. In a word, the Papacy of 850 was, under the conditions of the age, a logical result, a necessity of history, a great step forward in civilization. Bad as the Popes, the Bishops, and the Clergy often were, they were far better than the Barbaric Chiefs who passed as the state, engaged always in war, murder, pillage, robbery, rape, and debauchery. In spite of its hierarchic organization, the Church represented the people in a far truer sense than the secular Government did. The Clergy were recruited from all classes in the society and the lower Clergy were almost always of the people and were participant in the feelings, grievances, aspirations, and hopes of the people. The intelligence, morality, and character of Europe were in the Church. The secular Government was brute force exercised by a mere handful of reckless men banded together for war and plunder. Civilization required, therefore, that,

in this period of human development, the Church should control secular Government and restrain it in behalf of peace, unity, justice, and Individual Liberty.

The first real open contest between the Church and the secular Government—I will not call it the state—for the supremacy was the celebrated divorce case of Lothair II, son of the Emperor Lothair, and King of Lorraine. This brutal, shameless Prince brought false accusations against his faithful wife, Teutberga, in order to drive her from him that he might take a doubtful character, one Waldrada, to be his Queen. He first imposed the heathen ordeal of boiling water upon her, through which her representative came unharmed. He then called a Synod of the Clergy of Lorraine, and induced them to pronounce Teutberga guilty and annul his marriage to her. Another Synod of the same Clergy was induced to give consent to his taking Waldrada. This happened in the year 862. Teutberga appealed her case to the Bishop of Rome, Nicholas I, against both the King and the Lorraine Synod. The Bishop sent two Legates to examine into the merits of the case. They were bribed by the King to report in his favor. Nicholas was not, however, deceived. He assumed jurisdiction over both the Lorraine Synod and the King, nullified the decrees of the Synod, and forced the King to put away Waldrada and recognize Teutberga as his legitimate wife and Queen. Had Nicholas lived he would doubtless have deposed the King, but his death in 864 left the matter in the hands of his successor, Adrian II, who did not possess the indomitable will of Nicholas and who was made subject to pressure by Teutberga herself, who now asked for the divorce in order to be free from the persecutions of the King. Adrian would not, however, grant it. He maintained the jurisdiction of the Pope—we will hereafter term the Bishop

Pope, since his now established jurisdiction over the Kings added the final element to the Papal idea—in matters of divorce over the Kings, although he did not undertake to depose the recalcitrant King. The death of the King in 869 put an end to the controversy. The Papal power was now complete. It included the headship of the entire orthodox Christian Church, the sovereignty over the States of the Church, and jurisdiction over the secular Rulers in all matters of a religious or moral nature.

The threatening anarchy in Italy, during the first half of the tenth century, drove the Popes over again to the plan of the Saxon Kings of Germany for restoring the Empire over Germany and Italy and in 962 King Otto I received the Imperial Crown at the hands of Pope John XII, establishing thus the Holy Roman Empire of the German Nation, which existed under varying fortunes down almost to within the memory of some who live to-day, down to 1806.

Under the imperial reign of Otto I, Otto II, Otto III, and Henry II, *i. e.*, from 962 to 1024, the Popes, the Ecclesiastics generally, and the Emperors worked together with good understanding and good-will for the advancement of civilization.

The canker in the body of the Church had been the conferring of the episcopal office upon lay Vassals by the Kings and the rendering of service or tribute by these Vassals to the Kings for their possession of the Church properties, *i. e.*, simony. Under these four Emperors this practise, while not entirely discontinued, was largely minimized. Under the Emperor Conrad II, elected German King in 1024 and crowned by the Pope as Emperor in 1026, the old practise was again resumed and simony became again a deadly disease in the Church. Conrad's

son, Henry III, who succeeded his father to the German Kingship in 1039, reversed again the policy of his father in regard to this burning question and showed himself so conscientiously zealous in the reform of the Papacy and the whole Church that the Romans in 1046 conferred on him as Emperor the right to appoint the Pope. This was certainly a great mistake and it is probable that this inconsiderate act on the part of the Romans excited in the mind of the great Papal secretary, Hildebrand, the idea of freeing the choice of the Papacy both from the Romans and the Emperor. Certain it is that he must have revolved this idea in his mind about as early as this, for it was only about twelve years later that he brought forth his proposition in the Lateran Council of 1059, and it must have taken as long as this, in the slow methods of communication then practised, to have matured this plan and have secured the necessary adoption of it by minds so far apart geographically.

This plan, there and then adopted as the fundamental law of the Church, provided for the election of the Pope by the Cardinal or principal Bishops, Presbyters, and Deacons of the larger Diocese or perhaps the Archdiocese of Rome. At first something was contained in the law of Papal election about confirmation by the Emperor but this was soon omitted and the proposition of Hildebrand stood forth stripped of all limitations and ambiguity. It was simply that the election of the Pope should be an internal Church affair, freed from any interference by either Emperor or the lay citizens of Rome. The plans of Hildebrand went still further than this. He would free not only the Pope from the power of the Government in his choice and in the administration of his office but all the Bishops and Church officials, and would divorce all these

officials from the lay society by the rule of celibacy. It is not my purpose to relate the history of the struggle with the secular power to secure these ends. The point of importance in connection with our subject is the appreciation of the necessity of just these reforms in the Church in order to enable it to become a real protector of Individual Liberty against the despotism of secular Government. It was just the appointment of Church officials by Emperor, Kings, and Lay-Lords and their investiture with property by the secular powers which had led to the secularization and corruption of the Church and had made of it an institution more interested in tyrannizing over the Individual than in protecting him against the tyranny of the secular Government. In fact there was in the middle of the eleventh century very little distinction between Lay-Officials and Church-Officials. Many of the Bishops were not Ecclesiastics at all but laymen, laymen of the most vicious, cruel, and dissolute sort. The Church had become barbarized by the Feudal System. As we know, according to the principles of that system, office had become the incident of property. He who conferred the property, therefore, conferred the office. The Emperor and the Kings could, thus, create Bishops of their own appointment by selecting certain persons and conferring upon them the fiefs held by the Church in the several Dioceses from the Crown. The great difficulty in realizing the plans of Hildebrand was, therefore, the question of the properties held by the Church from the Crown. The Emperor and the Kings would not allow the Church to keep the Crown properties without having something to say as to who should hold and administer them, and the Bishops were unwilling to surrender these properties to the Crown and rely wholly upon the offerings of the faithful.

For fifty years and more the struggle of ideas went on and frequently degenerated into actual battle and the reckless shedding of blood. By the help of the Normans of Sicily, the Countess of Tuscany, the Saxons, and the Anarchists of Milan, the great Pope, Hildebrand, Gregory VII, who would neither hear to the appointment of the Bishops and Abbots by the secular power nor to the surrender of the Royal fiefs held by them, brought the King, Henry IV, to his feet. Then the fortunes of the King came to the ascendant and Gregory was forced from Rome. A Pope, Clement III, chosen at a rump Synod held at Mayence, was placed by the King on the Papal throne, the King was crowned Emperor by him, and Gregory died in exile at Salerno. Then Prince Conrad, the Emperor's first-born, turned against his father and caused himself to be crowned, in Milan, King of Italy by the help of the Saxons and Tuscans and broke the Emperor's heart. His second son, Henry, to whom he turned for help and consolation, followed the example of his elder brother and the miserable Emperor died in the deepest sorrow in the year 1106.

In the meantime the new Pope, Urban II, had sought to turn the rage of the contending factions against a foreign land. He first stirred Christendom to undertake the Crusades for delivering the sepulchre of the Saviour from profanation by the infidel. Of course, there was a religious purpose in these movements and in the minds of those who excited them, but I cannot help seeing in them a deeply laid political purpose also for clearing Europe, in some degree at least, of the belligerent Princes and Nobles and giving the Church a better chance for success against these in the struggle over the right of investing the Clergy with their offices and estates. They certainly had this result.

During the first twenty years of the twelfth century the

Church grew in strength and finally wrung from the Emperor, Henry V, the Concordat of Worms of the year 1122. In this fundamental compact the Church won its contention for the right of independent choice of the Pope and the Bishops and Abbots by the Clergy. The office was distinguished from the fiefs held by the Ecclesiastics and the fiefs were made incidental to the office instead of the office being incidental to the fiefs. The Clergy of the diocese should choose the Bishop and the Cardinal Clergy of the Roman Archdiocese should choose the Pope. The secular Princes ceased to invest with ring and crosier, *i. e.*, ceased to confer the ecclesiastical office, and conferred the fiefs by the symbol of the sceptre; the rule of celibacy was enforced, thus preventing the inheritance of the fiefs by the heirs of the Clergy; and the Pope ruled as Sovereign over the States of the Church.

Many historians bemoan the Concordat of Worms as an error of history. I do not. I do not think that history in a large sense makes errors. I think that men make errors in their misunderstanding of the true sense of the historic movement. I think the Concordat of Worms was a great progressive step in the march of civilization. It rescued the Church from secularization. It divorced the interests of the Prelates from those of the secular Princes in the exercise of despotic secular powers over the people. It brought the Church back again, in some degree at least, to its original position of a great cosmopolitan institution for the defense of the weak, the poor, and the downtrodden against the arbitrary and cruel power of the secular Government.

It was not to be expected that the Emperor, the Kings, and the secular Lords would easily accommodate themselves, however, to this order of things. The great phi-

losopher of history, Hegel, said that nothing is ever considered as historically settled until it repeats itself. The agreement at Worms was no exception to this rule. So soon as a powerful personality should wear the Imperial Crown it was practically certain that the struggle over the question of the investiture of the Clergy would be opened again.

On the 4th of March, 1152, Frederick, Duke of Suabia, known in history as Barbarossa, was elected German King and the battle was almost immediately renewed. It is not my purpose to follow the historic course of this great conflict. For our purpose it is sufficient to say that, successful at first, the King-Emperor finally found his match and superior in Pope Alexander III, and that the Emperor was not only forced to acknowledge the independence of the Papal tenure, the sovereignty of the Pope over the States of the Church, and the agreement at Worms concerning the investiture of the Clergy, but also the precedence of the Pope over the Emperor, the superiority of the Spiritual power over the secular, and the independence in local Government of the North Italian cities.

Once again, however, in the reign of the Emperor Henry VI, Barbarossa's son, the Imperial power seemed about to regain its old supremacy over the Papacy and the Church, only to fall again, in the reign of Frederick II, and during the Papal régime of Gregory IX and Innocent IV, into deeper decay. All that Barbarossa had conceded was again ratified and in addition to that the Emperor was compelled to acknowledge, in the Charter of 1220, the autonomy of the Bishops and Abbots, the ecclesiastical Princes, within their jurisdictions, and by that of 1232 the like autonomy of the secular Princes, making of the Empire thus a federal system of Government, with the sovereign

power as a shadowy something claimed by both Pope and Emperor, but in the general opinion rather accorded to the former as the representative of the Spiritual power in its supremacy over the temporal.

In France the claims of the Church were developed and advanced likewise upon the basis of the principles of Pope Gregory VII. The tenure of the Church officials was gradually wrenched from the feudal control of the King and Lay-Lords; the independence of the Papacy and its sovereignty over the States of the Church recognized; the celibacy of the Clergy enforced, and the jurisdiction of the Church over the domestic relations maintained and widened. There was here no Emperor with his claim of sovereignty over the Christian world with whom the Pope had to contend and there was little question that the Church took precedence over the secular Government. The Capetians were engaged in the work of establishing their tenure by hereditary right to the Royal power and they saw correctly that they must preserve the friendship of the Pope and the Clergy in order to attain this end against the opposition of the Feudal Lords. Even the great King Philip Augustus was compelled to yield to the commands of the Pope in his attempted divorce of his Queen under the fascination of the beautiful Agnes of Meran, and remain, at least outwardly, faithful to his lawful spouse.

It is true, however, that in the reign of Philip Augustus (1180–1223) foundations were being laid for a clearer distinction between the powers spiritual and the powers temporal which would preserve the secular Government in France against the extravagant claims of Gregory IX and Innocent IV. These consisted in the establishment of the University of Paris, the revival there of the study of the Roman Law under instructors brought over from, or at

least educated in, Bologna and the development of the class of legists or lawyers. Under the influence and direction of the lawyers, King Philip and especially King Louis IX (1226–70), Saint Louis, organized the law courts, known as the Parliament of Paris and its branches. King Louis also restored the Missi Dominici of Charlemagne.

It is easy to see how a revival of the knowledge of the Roman Civil law would favor the development of ideas hostile to the claim of the Popes and the Church that the spiritual power was superior to the temporal in secular affairs, and also to the claim of the Roman Papacy to an unlimited power over the Gallican Church. The fruits of this development, however, came later, at the beginning of the fourteenth century, under the reign of Philip the Fair, who was able to vindicate the independence both of the French Monarchy and the Gallican Church against the assertions of supremacy over both by the great Pope Boniface VIII. This was, however, a first step out of the Middle Ages and belongs rather to the next period in the development of the European state.

In England the Church, during the Anglo-Saxon period, was, as we have seen, though the daughter of Rome, somewhat more independent of Rome than the Continental Churches, nevertheless it was the most powerful institution of the Anglo-Saxon state. It held one-third of the landed property of England; it controlled the domestic relations of the people; and its Bishops, Abbots, and Priests shared with the King, the Earldormen, and the Theyns the entire Government of the Kingdom. In order to bring the Church in England more completely into the Papal organization, the Pope had sanctioned the conquest by the Norman Duke. So soon as the conquest was accomplished, the Pope and the King placed the Norman

Prelate Lanfranc in the Archiepiscopal seat of Canterbury and imposed upon him the task of Normanizing the Church in England. This work was carried rapidly forward, and in a short time Norman Prelates occupied most of the important places in the Church.

King William, however, tried to maintain for the Royal prerogatives the power exercised by the Anglo-Saxon Kings of the appointment of Bishops and Abbots and of vetoing the canons adopted by the Clergy. The Bishops and Clergy generally were inclined to yield to the Royal claims, but Lanfranc's successor, the great Anselm, overawed and overcame both King and Bishops and forced the King and the secular power to cease investing the Clergy by ring and crosier, *i. e.*, to cease investing them with the ecclesiastical office, and to be satisfied with the clerical acknowledgment of loyalty and obligation for temporalities, and to no further oppose appeal to the Pope. The successor of Anselm as Archbishop of Canterbury, William of Corboie, held at the same time the office of Papal Legate in England.

King Henry II succeeded in arresting the monarchic development in the Church in England momentarily at this point. By the Constitutions of Clarendon, 1164, it was proclaimed, among other things, that the Bishops should be elected by the Clergy subject to the approval of the King; that appeal might be taken from the decisions of the Archbishop to the King, which should be final; and that the Clergy must first establish in the secular Courts their clerical character before they could claim benefit of clergy, *i. e.*, the privilege of being subject only to the jurisdiction of Church tribunals. Both the Archbishop of Canterbury and the Pope repudiated these Edicts or Constitutions, and the murder of the Archbishop, Becket, by four

of the King's Knights, demoralized the King's cause and gave the victory to the Church and the Papacy.

The weak reigns of Richard, John, and Henry III followed, during which the Pope, the powerful Innocent III, placed his own appointee, Langton, in the Archiepiscopal seat of Canterbury, appointed the Bishops at will and even disposed of the benefices of the Church in England by granting many of them to Italians and others of foreign birth, and forced the King to receive his Crown from the hands of the Pope as a Papal fief. With this the supremacy of the Church under the Papal control reached its highest point in England.

With the close of the century, the thirteenth, the development of the English nation and national spirit had gone so far that it was bound to manifest itself in asserting limitations upon both the Royal and Papal power. The establishment of the English Parliament at the end of the century marks the beginning of the end of the Middle Ages in England, at least in so far as the supremacy of the Church was concerned.

The fourth point in our definition of the Middle Ages, viz.: the people, requires but brief treatment, because there was really no such body in the Middle Ages. There was a population; there were the subjects of Government; there were Vassals and tenants; there were serfs and slaves, but not people. This word expresses the conception of a body held together by some internal bond, by a spiritual consensus, a body which has a common consciousness of fundamental rights and a common sense of necessary duty, and a common intelligence and character-force adequate to the attainment of those rights and the fulfilment of that duty. In these things it is that the people is distinguished from the population, or a part thereof, from the mere sub-

jects of Government, from the mob, from a band of heelers or followers. In another respect, also, of a different character, it differs from these things, viz.: in the fact that it comprehends all persons within a given territorial unity, and not simply a part or a fragment thereof. A real people cannot, in fact, exist under the monarchic state-form or under the feudal aristocratic state-form. It can really exist only where it holds, in organization, the sovereign power, and where all the organs exercising governmental power, *i. e.*, power which may be realized by the employment of physical force, are subject to its superior regulation and control. A people in a true sense is a product of historic development, a late product, the appearance of which marks a high point, if not the highest, in political civilization.

During the Middle Ages the organization of the population in the Christian Church came nearer to being the people than in any other character. In every other character the population was broken up into fragments, having little or no connection and existing under the relation of slave or servant to master, or of tenant or Vassal to Landlord, or, at the highest, of subject to Government, with so great a variety in law and custom that no common opinion was possible. In the Church, on the other hand, a common religious belief and a common morality, together with certain common juristic principles derived from the Roman Civil law, prevailed and developed slowly, but surely, a consensus of opinion which made for the development of a people. When the consensus was ripe it seized the sovereignty and the population became the people, but this belongs to the period of the Revolution, between the Middle Ages and which lies the period of the revived Monarchy, the Renaissance, the Reformation, and the Free Cities. At this point it is sufficient to say that in the Middle Ages there was no

people, only a population in a variety of subject relations, but preparing under the discipline of Christian morals to develop a philosophical consensus, which would lead finally to the transformation of the population into the people.

The final element in our conception of the Middle Ages is the method of thought and reasoning, in other words, its logic; because the Middle Ages had neither philosophy nor science. In the psychic sphere, it had only theology, based on revelation, and logic. The course of thought and reasoning applied to any and every subject was thus a syllogistic deduction from premises furnished by revelation. The revealed premises went unchallenged as divine truth, divine principle, and the conclusion was reached by the simple process that A is B, C is A, therefore C is B.

Of course, the question as to the correct interpretation of the meaning of the revealed premises could not fail to arise, and the one thing that was settled about this in the Middle Ages was, that it was not to be made by the individual layman for himself. In some way or other it must be done by the Church. But again the question demanded further answer. By whom in the Church and in what way? Should it be by each Clergyman, or by each Bishop, or by each Archbishop, or by the Pope, or by a Council, provincial, national, or ecumenical? The Middle Age was never able to give a consistent answer to this part of the question, nor to that part relating to the mode or form in which the correct interpretation must be given, in order to distinguish it from mere personal opinion and give it the stamp of official authenticity. It is not quite fifty years ago that the Church finally settled this point. The thinking, therefore, of the Middle Ages had two great faults, at least. The first was the uncertainty about the correct meaning of the premises and the second was the barren-

ness of result. This element of the Middle Ages was, further, the most persistent of them all. It held its sway over the movement of thought to the period of Bacon and Descartes and was then supplanted by the inductive method, the method of research for the discovery and meaning of facts, and of proceeding by comparison and induction to conclusions.

From this brief description as well as definition of the Middle Ages, it will now be possible to discuss the question how the Middle Ages solved, or attempted to solve, the great problem of the reconciliation of Government and Liberty. As we have seen in our survey of the Feudal System, the Emperor and the Kings had no direct relation to the individuals of the great subject classes except to such persons as dwelt upon the landed estates of the Crown. Over these the Government of the Emperor and the respective Kings was that rather of master over slaves and serfs than of Sovereign over Subject. All other persons of the subject classes were the tenants, serfs, or slaves of the great Vassals of the Crown, lay and ecclesiastical, and were under the immediate unrestricted Government of each of these great Landlords on his own estate, while these Landlords were exempt from the control of the Emperor and Kings, except as provided in the grant of estates or offices by the Crown to them. As we have seen, therefore, the political system of the Middle Ages was practically autocracy by the local Lord of each estate or Manor over the tenants, serfs, and slaves living upon the same, coupled with anarchy in the relations of the Landlords, the fiefholders, to the Crown. The relation of Sovereign to Subject had given way almost entirely to that of Lord to Vassal, master to serf and slave. Governmental power had become incident to property in land. Public relations had

become subordinated to private. While there was thus a sort of Constitution subsisting between the Crown and each Vassal of the Emperor or King, reserving to the Vassal all powers, prerogatives, and liberties not surrendered to the Crown, there was no provision whatever of Individual Liberty for the serf or slave, the great mass of the population. While there was, thus, abundance of Liberty for the immediate Vassals of the Crown, and some Liberty for the Valvassors, or Vassals of the great Vassals, there was none whatever, so far as the secular institutions were concerned, for the serfs and slaves, the great mass of the population. Moreover, as we have seen, the secular Constitution provided no guarantee of the liberties of the Vassals. They were referred to their own interpretation and their own defense of them, each in his own case. This situation led indeed to frequent combinations among the Vassals to protect each member of the same by the combined power of all against the encroachments of the Crown, the most notable of which was the league of the Barons at Runnymede, and the extortion by them of Magna Charta from King John. If the Barons composing this league had remained outside of the Government and had not each exercised the powers of Government in his own estate, here would have been a constitutional organ of a logically consistent and most effective sort for maintaining Individual Liberty against governmental encroachment, but neither of these conditions held in regard to this league of the English Barons of 1215 or to any other Baronial combination against the Government of the Emperor or of the Kings. The Baronial league of 1215 developed, before the end of the century, into the House of Lords of the national Parliament, which itself developed into the supreme law-giving body of the Government. The Baronial leagues

upon the Continent were generally of short duration and created no permanent institution for the defense of Individual Liberty, either for their own members or for the lower classes of the population.

We must, therefore, turn again to the Church to find the defense of the Individual Liberty of the great mass of the population against the despotism of Government either of Emperor, King, or Feudal Lord. The Church, as we have seen, had reached the culmination of hierarchic organization under the Papacy of the Bishop of Rome. It paid no attention to secular lines. It was now the one universal organization of Western Christendom and its membership included all persons of whatever sex, class, or age. Had the Church held itself free from all participation in, or exercise of, the powers of secular Government, *i. e.*, Government by physical force, actual or possible, it would have been a consistent and most powerful definer and defender of the Liberty of the Individual, but such was not the case. We have seen how Bishops and Abbots became the Vassals of Emperors and Kings, receiving vast landed estates from them and governing, in all respects, the population resident upon the same, becoming thus Manorial Lords as well as Ministers of religion. The result of all this was, as we know, that the Emperor and the Kings claimed the right to confer the ecclesiastical office as well as the properties of the Crown attached to it, and actually made, in this way, dissolute laymen Bishops and Abbots, and that such Bishops and Abbots addressed themselves to the exercise of despotic governmental power over the inhabitants of these estates and then over their Church subjects not resident on their estates, rather than to the work of protecting the individual against the despotic and arbitrary powers of the secular Government. Gregory VII,

Benedict IX, Innocent III, and Innocent IV, did great work for civilization in separating the Church from the secular Government and secular society, by their reforms concerning the investiture of the Ecclesiastics with their offices and concerning the marriage of Prelates and Priests. Nevertheless they could not effect the surrender of the estates held by the Bishops and Abbots from the Emperor, Kings, and Lay-Lords, and thus the Prelates continued to be Governors over such districts in secular as well as ecclesiastical matters and felt themselves more interested in Government than in Liberty. Some of the Popes were, indeed, in favor of surrendering the estates of the Church held of the secular powers and reducing the Church to its original poverty and to dependence upon the free contributions of the faithful, but the Bishops and Abbots generally would not hear to it.

It is easy to understand that when the Church lost thus in the Middle Ages its fundamental character as an institution whose power rested upon conviction, influence, and the response of the religious sense and the moral sense, and adopted the methods of secular Government, *i. e.*, physical force, to realize its purposes, it became even more despotic than the secular power itself, because it undertook to control by physical force not only the outward act, but the internal thought and belief. Its persecutions for heresy were the culmination of despotism in Government and it is difficult to see that these persecutions furthered civilization from any point of view. But with all this the Church was, during the entire Middle Ages, the refuge of the common man against the rapacity of the secular powers. The Prelates and also the general Clergy maintained the right of asylum in the Churches, the right of intercession with the secular powers in behalf of the Liberties of the common

man, even in behalf of the slave, and also enforced what was known as the Truce of God, whereby violence was restrained by common agreement for a large portion of the time of each week. They held the torch of learning; they represented reason as superior to passion; they represented conscience as opposed to barbaric lust; and they were the patrons of art. Their law in the secular Government of the inhabitants of the Church estates, when religious belief was not involved, was more humane than the feudal custom which elsewhere prevailed. They substituted the Roman law system of evidence for the barbarous ordeals of the secular tribunals. Lastly and most important of all, they helped mightily in the building of the cities, where, ultimately, the common man developed the power of democratic organization and opinion. During the centuries from the ninth to the thirteenth the oppressed tenants, serfs, and slaves of the Manorial estates sought refuge in the towns or places where the seats of the Bishops and Abbots were located. At first, they came, of course, under the Government of the Prelates, not, however, as residents upon Church estates, but as subjects of the Church. Their position was thus from the first much freer than that of the dependants of the Church Manors, and as they became associated in trade and industry with each other in the towns and were under the jurisdiction of the Roman law, a law based upon general principles and administered largely by the Clergy, they gradually developed those points of agreement in opinion concerning rights and wrongs, Government and Liberty, which made of them a real citizen body and prepared them to take municipal Government into their own hands. But this belongs to the next period in the political development of Europe and its treatment must be deferred to our next chapter. The great

lesson for us in this connection is that when the defender of Individual Liberty becomes participant in the legislative and executive Government it transfers too largely its interests and its efforts to Government, to the expansion and exaggeration of Government, to remain a real and sufficient defender of Liberty. The time has then come for the establishment of a new organ of Liberty outside of the political Government, one which stands for the subjects of Government and which sees its first, if not its only, duty in protecting the Liberty of the Individual against the unwarranted or unnatural assaults of Government upon it.

CHAPTER VIII

THE REVIVAL OF THE MONARCHY

Perhaps the better title for this chapter would be the development of the National Monarchies, because what had passed as Monarchy before this period differs very greatly from the creations of the fifteenth, sixteenth, and seventeenth centuries bearing that name. The elements and movements contributing to the production of this new Monarchy were the Free Cities and their growth from the eleventh to the fifteenth centuries, the Renaissance or the new Learning, the Reformation, the Standing Army, the Royal power of taxation, and the increased diplomatic activity of the age.

Let us examine all of these in some detail.

First, the Free Cities.

In the early Middle Ages, the towns were either the Municipalities of the era of the Roman Empire, or they had grown up chiefly around the seats of the Bishops. In both cases they were governed locally, at least, by the Bishops under the general principles of the ecclesiastical and Roman Civil law. During the Middle Ages the secular Lords and the Kings, who held estates and domain around the towns, either encroached upon the Bishop's jurisdiction or kept Bailiffs in the towns to administer the Feudal law over such of the inhabitants as were not of the Roman or Celto-Roman race. This double jurisdiction and variety of law administered in the towns created constant turmoil, with

the result that the inhabitants themselves, thrown much more closely together than the inhabitants of the country, and living thus under much more favorable conditions for the development of a consensus of opinion among themselves, began forming associations for the protection of their interests against the arbitrary rule of either Barons or Bishops. These associations, originally economic in their nature, gradually became also political, and either bought or wrested by force from the Kings or Barons articles of incorporation for the towns, thus restoring them to the condition of Municipalities under the Roman system.

Closely connected with this development, and in no small degree the source of it, was the rise of the Jurists or lawyer class, especially in France. The Pandects of Justinian were discovered and made the basis of the Law School of Bologna in the first half of the twelfth century, and the study of them spread rapidly toward the Northwest and became quickly a part of the programme of studies in the Universities at Montpellier and Paris. It was the new class of Professionals created and developed by these studies, the Jurists, who knew how to organize the Municipalities on a secular basis, who created, or rather recommended the King of France to create, the Judicial Parliaments of France, and who became most valuable allies to the Kings in creating the new Monarchies.

The great importance of the Municipalities or Free Cities to the development of the new Monarchies consisted in the facts that their freedom or independence was freedom from the Government of the Baron, or the Bishop, not freedom from the Government of the King, and that a strong popular power friendly to the King, as its protector against the encroachments of Baron and Bishop, was thus created. The relation between the King and this part of the popu-

lation was thus not the relation of Lord to Vassal, and then to under-Vassal, but of Ruler to Subject.

The idea that the individual owed an allegiance and obedience to Government not conditioned by any specific contract between himself and any superior nor, on the other hand, of the nature of slave to master, began to come into the consciousness of the urban populations. At first this conception was naturally very dim and uncertain, for the burgher class, as it originally formed itself in the eleventh and twelfth centuries, was composed of the little tradesmen, artisans, and a few small agriculturalists, who had taken up their residence within the town limits; but as the lawyers and physicians and official classes grew and were fused with the tradesmen, artisans, and small land-owners into the burgher class of the fourteenth and fifteenth centuries, the notion of the relation of Subject and Ruler grew clearer and clearer, and supplanted more and more, as time wore on, the feudal conception of Vassal to Lord. This new burgher class, often called the third estate, furnished the stock and stuff for the development of the new Monarchy, not only in a physical and material sense, but also in an educational and a theoretical sense, in the necessary sociological sense for the development of a people out of a hodge-podge of conflicting classes. It must not be understood that this new burgher society had anything in the nature of a national consensus or clearly perceived its relation to the King. Generally speaking we might say that there were as many burgher societies as Cities, and that each City went to the limit of independence not only against Baron or Bishop, but also against King. Political thought was not yet refined enough to conceive the City as a local administrative body under a higher legislative power and a broader sovereignty. Such distinctions came

much later. At the beginning of the fifteenth century each Free City regarded itself as practically independent of every superior, as practically sovereign, and in some cases, as in the Lombardian Cities in the last half of the twelfth century, they leagued themselves against the Royal or Imperial power, and actually, in the case cited, overcame it. But with all this crudeness, confusion, and sometimes hostility, the urban mind was beginning to be formed and like conditions were forming it practically upon the same lines in the different communities, and the Kings were becoming more and more conscious that here was to be found the physical and intellectual power for lifting the throne above Papal, episcopal, and baronial defiance and making of it the superior Government over all alike, virtually the state itself.

This relation of the urban population to the Crown was seen most clearly in the building of the Spanish Monarchy where the league of the Cities of Castile, the Holy Hermandad, furnished King Ferdinand with the military and the financial power for realizing his plans for the creation of the national Monarchy of Spain. Such national leagues of the Cities were headed straight toward the development of a people, a people which would, of course, at first, be the people subject, but out of which would develop, when the time and the conditions were ripe, the people sovereign. And even when these leagues did not exist, like conditions and relations produced, in the different Municipalities, something like an agreement in opinions and purposes and made it easy for the King to become the immediate bond of union between them. On the whole the Free Cities furnished the popular power for offsetting the decentralizing power of the Barons and the Bishops, a power which increased, too, continually at the expense of that of the

Barons and Bishops, in that the better conditions offered the lower classes, the common man, in them drew the tenants, serfs, and slaves of the Lords into their walls and depopulated the Manorial estates. This popular, democratic power of the Free Cities found its first national organization around the new Monarchies of the fifteenth, sixteenth, and seventeenth centuries and was by them fused into the new nations of modern times, and it enabled these Monarchies to triumph over the Feudal System and the Church and to lead the way to the modern conception of the state.

Secondly, the contribution made by what is known in history as the Renaissance to the development of the Monarchic state was, if more psychical, equally potent. By some historians the term Renaissance is made to cover the entire movement out of the Middle Ages into the modern time. In this would be included the revival of ancient learning and culture, the discoveries in chemistry, physics, mechanics, cosmology, and astronomy, the Reformation, and the new Monarchies of the fifteenth, sixteenth, and seventeenth centuries. I think it better in some respects to give it a narrower meaning, however closely connected all of these parts of the one great development may be, because I am scientifically interested in not discrediting the Middle Ages, by representing them as the "Dark Ages," to which light came only from the Orient and Ancient Greece and Rome. There were elements of developing culture in the West which may, indeed, have been helped on by the revived knowledge of the Orient and of European antiquity, but which were indigenous and which asserted themselves with very little encouragement from without. I prefer, therefore, to use the term Renaissance as designating the revival of a knowl-

edge in Europe of the Orient and of European antiquity, although I would not confine it to the study of Hebrew, Greek, and Latin and the literatures embraced in these languages. I would make it include also the knowledge of the social and political systems and of the educational principles and philosophical and æsthetic spirit which distinguished the Ancient World from Mediæval Europe. Only in this way, I conceive, can we give due credit to all the forces conspiring to lift Europe out of the Mediæval into the Modern period of its development.

The Renaissance, in the sense we have given it, began with the revival of the study of Latin in Italy in the middle of the fourteenth century. Undoubtedly, a number of persons were engaged in this work about the same time, but the one name which has been celebrated as the originator of the movement is Francesco Petrarcha.

Ancient Latin and ancient Greek were, however, so closely connected that the researches in the one language naturally ran into those in the other. Petrarch himself did not know Greek, but he recognized the importance of a knowledge of this more ancient language and literature and urged the necessity of reviving the study of them. It was Boccaccio, however, who stands to the revival of Greek learning as Petrarch to that of Latin.

The first step was, of course, the collection of Latin and Greek manuscripts. A large number of Italian scholars, chief among whom were Filefo, Poggio, Guarino, Aurispa, addressed themselves to this work, sustained by the men of wealth, the Rulers, and even by the Popes. A veritable craze for learning spread through all classes, especially the upper classes, in Italy and from Italy throughout Christian Europe. Reuchlin, Erasmus, Lope de Vega, Calderon, Cervantes, Rabelais, Colet, More, Ascham, and Shake-

speare are names familiar in every modern household, as are those of Ariosto, Machiavelli, Guicciardini, and Lorenzo de' Medici.

Close upon the collection of the classic manuscripts came the invention of paper and printing, and Aldo Manuzio set up the world-famous Aldine press in Venice. Froben founded a similar business in Bâle and Etiennes in Paris. From these went out, from the end of the fifteenth century onward, the printed books which made the earliest libraries of such books in the European world.

In this study we are not directly concerned with the belles-lettres, the rhetoric, the drama, or the art of the Renaissance. Our treatment deals chiefly with the revival of the knowledge of the social and political systems of Greece and Rome and with the spirit engendered by that knowledge towards the social and political institutions of the Middle Ages. It is not necessary for us to restate the features of those systems and institutions. We know from what has, already, in sufficient detail, been presented that the social and political systems of ancient Greece and Rome were founded by men on the basis of human nature and for mundane purposes, while the institutions of the Middle Ages were held to have, and believed to have, a divine source and an extramundane purpose. The sovereignty and authority of the Church, the Papacy, and the Holy Roman Empire were held to be from God over men and to be exercised for the preparation of mankind for a future world.

Throughout the Middle Ages and especially the later period of this era, mankind manifested a continually growing restlessness and rebellion against the repression of the wants, passions, enjoyments, aspirations, and purposes of human and mundane life imposed by the Mediæval system

of ideas and institutions. Entirely independent of the revival of ancient learning, men had begun everywhere to exercise their faculties more freely in every direction. We have only to remember that such men as Roger Bacon, Albertus Magnus, Bonaventura, Thomas Aquinas, Dante, and Abelard lived and worked before the Latin manuscripts were unearthed to convince ourselves that human reason was not extinguished in the twelfth and thirteenth centuries, and that it would have found the way to free European mankind from the Mediæval system, in part or in whole, after that system should have accomplished its great disciplinary work in taming barbarism and sensuality and in fitting man for freer thought and freer life. We must, therefore, look upon the revival of classical learning more as an occasion than as a fundamental cause of the great awakening of the fifteenth and sixteenth centuries. As an occasion it had truly a most powerful effect, especially in the modification of political, legal, and social ideas and ideals. The richness of the city life and of the, at least, more democratic institutions of Greece and Rome furnished a glowing contrast to the poverty and monotony of rural existence in feudal Europe, and the picture of classical glory and refinement, of general cultivation and human happiness, helped the European mind greatly to divest itself of its thraldom to a system which indeed had had its place in human development and had done well its work therefor, but which, in the fifteenth century, had accomplished the great purpose of its existence and must yield the control of European civilization to a new system of ideas and of life.

During the first decades of the classical revival, the enthusiasm for learning and zest for effort in its acquirement kept the movement within religious, moral, and civic

bounds. No one seemed to foresee in these earlier years any danger in the great awakening to the existing institutions of society and Government. As I have said, even the Popes gave encouragement to, and participated in, the movement. When, however, the scholars went beyond the study of the grammar and literature of the Classic languages and began to investigate and to teach the social, civil, and political life, customs, and institutions of the Classic peoples, then the danger point was reached, and men began to think of the restoration of the Pantheon in religion and the democratic Municipality in Government.

The force of this impulse came first, as was natural, to the Italians. As it advanced and spread it became more and more radical and reckless and by the beginning of the sixteenth century it had ruined Italy socially, religiously, morally, and politically. Paganism, immorality, dissoluteness, lust, obscenity, deceit, and assassination ran riot. The loosening of the bonds of Church and Empire had opened the way for tyrants like the Visconti, the Sforzas, the Foscari, the De' Medici, and the Aragonesi to set themselves up in Milan, in Venice, in Florence, and in Naples. Their Government was indeed human, if by that is meant that it had nothing of the divine in it. It recognized no restraints either of religion, morals, or law, and yet it was necessary for curbing the anarchy and decadence to which the triumph of the Renaissance over the Mediæval system had at last opened the way. These Governments, however, could not solve the problem of the new Italian unity and of the making of the new Italian nation. Pope Alexander VI, Borgia, tried it from Rome, and Lorenzo de' Medici from Florence, but with no success. Italy became, for more than three centuries, a prey for Germans, French, and Spaniards to struggle over. In Government, morals, and

religion the revival of classical learning had had only negative results. It demoralized the old system, but from a constructive point of view it was a failure.

Its baleful influences now spread from Italy over Europe as had earlier its healthful influences. The whole of Europe seemed on the eve of catastrophe, on the eve of dissolution itself. But history carries the cure for her diseases. At the darkest moment two great movements set in which were to save civilization from extinction and set it upon a new road of progress. These movements were the Reformation and the Counter-Reformation.

A thorough study of the Reformation must contemplate it from at least four points of view, viz.: the discipline of the Clergy, the theological doctrine of the Church, the Government of the Church, and the philosophy of the movement as a forward step in the world's progress. As we have seen, the effect of the Feudal System upon the Church had been to change the higher Clergy into secular Lords, or rather to put secular Lords into the higher Church offices, where they still pursued their lives of sport, warfare, luxury, and dissoluteness. By the middle of the fifteenth century the condition of the Church everywhere had, in so far as the moral character of the Clergy was concerned, become deplorable. The reforms of Gregory VII had run their course and ceased to have further influence, and the Renaissance had, as we have seen, finally contributed largely to the demoralization of the whole society. The Pope at one end, and the lower Clergy at the other end, of the hierarchic organization had been dragged down and held down by the power of the Prelates, and morally the world seemed on the very verge of dissolution. The Popes and the better part of the Clergy, that part which was not simply the secular nobility in clerical office, had

striven again and again to check the downward course and to reform the morals of the Ecclesiastics. This was the chief meaning of the creation and work of the Monastic Orders, the Benedictines in the early centuries, and the Franciscans, Dominicans, and the Brethren of St. Jerome in the fourteenth century. For a little while each of these new creations succeeded in stemming somewhat the decadence in clerical manners and morals, but soon each in turn gave way and was dragged along by the general current.

Three great Councils of the Church, that at Pisa in 1409, that at Constance in 1414, and that at Bâle in 1431, the last two usually considered ecumenical, undertook to deal with this great question of the morals and discipline of the Clergy, but the position of the Council itself in the hierarchy of ecclesiastical authority was not then fixed. Whether it was superior to the Papal power and had jurisdiction over the Popes or not was a question still in dispute. The great Chancellor de Gerson of the University of Paris, and the bold and brilliant Archdeacon of Bayeux, Nicholas de Clémenges, defended the proposition that the ecumenical Council was the supreme power in the Church, but the Popes and the Italian Prelates generally sustained the Papal claim to the highest authority. The Councils themselves were thus split upon this fundamental subject, and their ability to consider other things, not to speak of their ability to accomplish anything, was thus greatly weakened, practically nullified.

There is no doubt, however, that the active and continued agitation during the fourteenth and fifteenth centuries in the bosom of the Church itself resulted in considerable improvement of the morals of the Clergy, and it must not be forgotten, in this connection, that the blame for the de-

plorable situation rested more upon the Prelates, who were in fact feudal Barons instead of real Bishops and Abbots, than upon the Popes and the lower Clergy, and that, as is always the case, the badness of the situation was exaggerated by the reformers. The fact is that the time had come when the whole system, political and ecclesiastical, of the Middle Ages was approaching a crisis in the development of the world's history, and that the men of the age were themselves only half conscious, if conscious at all, of the forces which were driving them onward.

The Reformation demanded a complete purification of the morals of the Clergy, and a complete separation of the functions of Ecclesiastic and Feudal Lord. How this could be accomplished without surrendering the lay fiefs held by the Ecclesiastics was difficult to see. In fact it was about impossible. It was also difficult to see how the morals of the Clergy could be purified under the rule of celibacy. The Ecclesiastics must be allowed to marry and have homes and families in order to prevent them from the commission of sexual vice. These two demands of the Reformation in regard to the discipline of the Clergy went far beyond the plans for the improvement of that discipline entertained by the Church itself, and it soon became manifest that they could not be realized in the bosom of the Church, but required separation from it.

The necessity for the Reformation from the point of view of theological doctrine came more slowly to consciousness. The theology of the Church itself was somewhat unfixed and unclear until the Council of Trent in the middle of the sixteenth century settled its most fundamental points. However, there was continual opposition to, and dissatisfaction with, the ever-increasing elaboration and magnificence of the ritual, and, in less degree perhaps, to

and with such doctrines as transubstantiation and baptismal regeneration, and above all the doctrine of indulgences. It was this doctrine, as is well known, which provoked the indignation of Luther, and against which his famous theses of 1517 were hurled. It was, however, only in the German-speaking lands, or at least chiefly there, that the Reformation as a change in theological doctrines played a great part. Elsewhere it was regarded more from the other points of view or, at least, from some of the other points of view which I have mentioned. It must not be understood, however, that in Germany it was regarded from the doctrinal point of view only. Quite on the other hand, in Germany, more than anywhere else, the discipline of the Clergy, Church Government, and the general philosophy of the movement entered also into consideration, controversy, and the ultimate adjustment.

The matter of doctrine is not, however, of any great importance to the subject with which we are concerned in this work. It is the question of Church Government, the question of the relation of the Church to the civil Government, and the question of the general philosophical significance of the movement as modified by the Reformation, which constitute our problem. The Reformation demanded and effected a very great change in the Government of the Church itself, and in the relation of that Government to civil Government, both in the countries where it produced a complete separation of the religious communities from the Roman Catholic organization and in those where the separation was not complete.

In the first place, the divine origin of the Papal supremacy and of the temporal power of the Papacy was denied and disproved, and the historical steps in these developments were laid bare. As usual, men went too far in de-

nouncing the Papacy and its temporal power as frauds. While they were, indeed, shown not to be of divine origin in the then understood sense, they sprang out of the necessities of history and civilization, and were in that sense providential. The true philosophical way of considering those questions would have been to have tested the legitimacy and the value of those institutions from the point of view of their service to the civilization and progress of mankind and, if it should be shown that they had outlived their usefulness, still to have buried them with decency and honor for what they had rendered of worth in the past. But the Mediæval mind, and more especially the Renaissance mind, did not work that way. When an institution claiming divine origin was shown to be of human origin, it was immediately denounced as a fraud, to be done to death and cast unto the dogs. Such exaggeration of view seems to be necessary, however, in order to stir men up to the revolutionary temper. But it generally leads men too far in their deeds and provokes reaction.

It did so in the case of the Reformation, as is well known. What is termed in history the Jesuit Reaction was the natural result of the excesses of the Reformation. The Reformation virtually reduced the Roman Papacy to a supremacy in Italy only. The course of the Reformation in the complete sense which, as to Government, it ran in North Germany, Scandinavia, the Netherlands and England was, indeed, halted in Spain, France, Austria, and Poland by the Counter-Reformation, brought about by the Council of Trent and the Jesuit Order, but not even in these countries did the Papacy and the Roman Curia ever regain the supremacy over the European Church enjoyed by them before the Reformation. The idea that the Catholic Church within a given nation or state had a cer-

tain independent existence and authority over against the Pope and the Roman Curia sprang up and made its way with ever-increasing clearness and force among all these.

The results of this idea were manifold. First, it seemed to require the organization of national Church Councils alongside of the ecumenical Council. Second, it seemed to require some limitation upon the powers of the ecumenical Council in reviewing the decisions and acts of the national Councils. Third, it seemed to require some national veto upon the promulgation of Papal edicts and orders within the jurisdiction of the several national Church organizations. Fourth, it seemed to require some national power for the revision of Papal appointments within such jurisdiction. The very fact of the existence of such ideas shows that the nations were already forming themselves through a fusion of the Feudal classes in the different natural territorial divisions of Europe, and that a national consciousness of rights and wrongs and a national consensus of opinion were being developed.

From the early appearance of such impulses, however, to their full effect in the organization, religious and political, of the nations was a long call. The long struggle of the classes, developed under the Feudal and Ecclesiastical organization of European society, was yet to be passed through. The lower classes must find a point of unity around which to rally in their effort to free themselves from the local tyranny of Baron or Bishop or both. During this period, the powers of the newly developing National Churches against the former unlimited supremacy of Rome must be lodged in some powerful hand in each of these growing nations. In the struggle of the Feudal classes, this could not be any Congress or States General. It could not even be the National Ecclesiastical Council itself.

It must be the ever present, always ready, universally commanding Royal hand. The King must approve the decrees of the National Church Councils for their validity. The King must allow or deny appeals to Rome from the decrees and decisions of the Church and Clergy within his national jurisdiction. The King must approve or forbid the publication of the decrees of the Pope and the Curia as authoritative. And the King must ratify or reject the nominations made by the Pope or the choice made by the Chapters to ecclesiastical office. This was the new relation of the Church, or Churches, produced, or at least established fully, by the Reformation in those states in which the authority of the Pope, the Roman Curia and the ecumenical Council was still acknowledged. This was the new situation in Spain, France, Poland, and Austria, and after the Peace of Westphalia in the South German principalities.

Where the Reformation caused the entire severance of the Church communities from the supremacy of the Pope and the Curia, the change in the Government of the Church was much more radical. This was the case chiefly in England, the Scandinavian Kingdoms, the Netherlands, the North German principalities, and in some of the Swiss Cantons. In the first of these, England, the movement proceeded more from governmental considerations, in the others more from doctrinal. The English King, Henry VIII, at first took decided ground against the Lutheran doctrines. In 1521 he caused to be published a book written by himself in answer to Luther's treatise *The Babylonian Captivity*. The King's book was entitled *The Defense of the Sacraments*. It ran through several editions and was translated into several Continental languages. The Pope was so greatly pleased with the King's loyalty

that he conferred upon him the title of "Defender of the Faith." Very soon, however, political and marital, not to say sensual, motives induced the King to enter upon a course which was to land him upon the side of the Reformers. He desired to divorce himself from his Queen, Catherine of Aragon, and marry one of her pretty ladies in waiting, Anne Boleyn. The controversy between the King and the Pope, Clement VII, of the powerful house of Medici, continued with varying features and fortunes through years. At length the Pope made the mistake, from the point of view of the interest of the Holy See, of appointing Cranmer, Archbishop of Canterbury and Primate of England, as his Legate in England.

Cranmer, as representative of the Pope, immediately proceeded to annul the King's marriage with Catherine and to confirm his union with Anne Boleyn. The Pope repudiated Cranmer's act and demanded of the King that he should take back Queen Catherine as his lawful spouse, and should cease his attempts to rid himself of her. The Parliament stood by the King, and in November of 1534, passed the Act of Supremacy, declaring the King to be the supreme head of the Church of England, and investing him with the power to reform the Church. After this the King of England could even more truthfully boast that he was the Church, than could Louis XIV that he was the state. Henry VIII proceeded to use his powers as head of the Church in every direction, to prohibit any exercise of Papal power, to control the assembly and the decisions of National Church Councils, to appoint the higher Ecclesiastics, and, most significant of all, to confiscate the Church properties and with them to create a new House of Lords, quite subservient to his will, and inasmuch as the House of Lords was at that time virtually the Parliament, the

Parliament became in substance the King's Council of lay and Ecclesiastical appointees.

Nowhere else did secular, political, and selfish reasons for the Reformation prevail to the same extent as in England. They were not entirely absent, however, anywhere, and the political results were practically the same everywhere, except perhaps in the relatively unimportant Cantons of Switzerland. In the Scandinavian and German States the Princely heads of these States became the heads of the Church within these States. The Princes succeeded to the Papal supremacy, and the episcopal powers were exercised by Consistories or Councils in each diocese, whose members were appointed by the Princes respectively.

The Counter-Reformation and the propaganda of the Jesuit Order provoked the conflict of arms known as the Thirty Years' War, but the results of the struggle were little more than a confirmation of the conditions existing at its beginning. A few of the German states were brought back under the supremacy of the Pope, and France and Poland were purged of Protestantism. Protestantism maintained its existence, but Catholicism was stronger in 1650 than in 1600. This latter statement must not, however, be taken as meaning that the Pope and the Roman Curia regained the Mediæval powers which they had exercised everywhere in Europe before the outbreak of the Reformation. Instead of the Universal Roman Catholic Church, there existed after 1650 the National Catholic Churches of Spain, France, Austria, Poland, etc., more subject to the Royal supremacy than to the Papal, not, however, so completely as in England. They were also further distinguished from the condition in England in that the change in the governmental relations to the Roman See did not lead, as in England, to any reform worth mention in doctrine.

The Crusades, the development of the Free Cities, the Renaissance, and the Reformation had thus demoralized and disrupted Mediæval society, and had overthrown the Mediæval ideas of Church and Government. I will not say Church and state, as the usual phrase goes, because men had not yet thought out the conception of the state as something more ultimate and fundamental than Church or Government, something which might finally control both Church and Government and reconcile them with each other.

Upon the foundation of this demoralized and disrupted society the national Monarchies now arose, as the bearers of the new national spirit. First, in Spain, with union of the thrones of Castile and Aragon by the marriage of Ferdinand of Aragon with Isabella of Castile in the year 1469. They were only Crown Prince and Crown Princess when married, and did not unite the two countries under their own Royal authority until 1479. They became rulers first in Castile in 1474, and began there the governmental reforms looking to the centralization of all governmental power in the Crown. The instruments made use of by these gifted rulers were, as I have pointed out, found ready at hand in the demoralized society. First, the Free Cities of Castile had already formed a league for the protection of their trade and commerce against the robber Barons, called the Holy Hermandad. This league had a standing professional Army of two thousand or more cavalrymen, a well-schooled, capable gensdarmerie. This force was intrusted to the commandership of King Ferdinand, and a permanent stamp-tax was allowed him for its support. This body became the nucleus of a standing professional Army, and this Royal impost the basis of an independent system of Royal taxation. The King was thus recognized by the Free Cities as the protector of the common people

not only against foreign attack, but also against the rapacity of the Nobles. The new Royalty manifested thus, from the outset, its democratic character. Then King Ferdinand secured the grand-mastership of the three orders of Castilian Knighthood, St. Iago, Calatrava, and Alcantara. He thus blocked the recruitment of military strength by the higher Nobles from the ranks of the Knights, and made of the Knights an instrument for strengthening the Royal power against the greater nobility. As the Knights were the only military organization from which the great Nobles had obtained soldiers, they were now shorn of all military strength, and the entire military power was concentrated in the King's hands. Finally, through the loyalty of the great Cardinal Ximenes and the Grand Inquisitor Torquemada, King Ferdinand was able to make the Church in Spain substantially the Spanish National Church, and to limit the powers of the Papacy and the Roman Curia over it to certain definite functions under Royal consent. The Inquisition was fashioned into a powerful political instrument for the purpose of controlling the great Nobles by secret summary processes and disposing of them when they showed themselves dangerous to the Royal authority. The Church became thus an instrument of Government, a most powerful instrument, in the hands of the King. Its democratic power was added to that of the Free Cities, and both were grasped and wielded by the able Monarch to subject the Feudal nobility to the arbitrary power of the Crown. Thus far King Ferdinand brought the development of the Monarchy. His grandson and successor, Charles, known in history as Charles V, the Emperor, was barely able, through the powerful services of Cardinal Ximenes, who was great in war as well as peace, to hold the ground. Philip II, however, Charles's son, built further.

All students of Spanish history know that there existed throughout Spain in the middle of the sixteenth century codes of liberties and privileges of all classes in the society known as Fueros—we would call them now Bills of Rights and Immunities—and that these liberties and privileges were interpreted and upheld against the arbitrary acts and encroachments of Government by the Judicial tribunals, which, in each Kingdom or Principality, were under the supervision and control of a personage called the Grand Justiciar. The Justiciar was chosen originally by the Mediæval Estates General, the office becoming in some cases hereditary, following the general principle in this respect of the Feudal System. Philip II saw in this institution of the Justiciar and the tribunals subject to his supervision and control the chief remaining obstacle to the absolutism of the Crown. He brought his whole power and tact against it, not hesitating to employ the secret agency of the Inquisition. He finally succeeded in putting the Grand Justiciar to death, in making his successors Royal appointees subject to dismissal at any time, in bringing the entire administration of justice under Royal control, and in abolishing those Fueros that stood in the way of his absolute power. With this the last obstacle to his absolutism was overcome, and at the close of the sixteenth century the Spanish Monarchy had reached the point where the King was in reality the Sovereign over the whole Spanish people, that is, over the whole population of the Iberian peninsula. The classes of the Mediæval society were now fused into the one subject body of the Hapsburg Monarch, who had either destroyed or reduced to his absolute control every institution, power, or custom which might exert any limitations upon his own will and pleasure.

We must date the beginning of the restoration of the

Monarchy and of the development of absolute Government in France from the reign of Louis IX, Saint Louis, as he was fondly termed by his people, *i. e.*, from the second and third quarters of the thirteenth century. Saint Louis was, so to speak, the first of the lawyer-Kings of France. He sought to substitute the general rule of the Roman Law for the varied Feudal customs of the different parts of the Kingdom. He absolutely forbade the Mediæval practises of self-help in the settlement of internal difficulties of a judicial nature, and substituted therefor the jurisdiction of the Royal Courts, the so-called Parliaments. By such means he curbed the feudal Lords and subjected them to the authority of the Crown. He also made use of Lawyers instead of feudal Barons and civil officials. Although of a deeply religious nature and also a good Churchman, he would not acknowledge the claims of the Church to supremacy over the King nor of the Pope to supremacy over the Church in France. He appointed the Bishops of the Church in France, and he would not allow appeals to Rome on any secular matter, and forbade all exactions of revenue from the Church in France by the Popes and the Roman Curia, except under Royal consent and approval.

Saint Louis's grandson, Philip IV, le Bel, carried this development further. Philip was also a lawyer-King, more pronounced than Saint Louis. He had none of his grandfather's religious mysticism, but was logical, cold, and calculating. With his Roman lawyers he worked out clear distinction between the secular and the spiritual powers, and confined the Ecclesiastics rigidly to the exercise of the latter. He also insisted, with much success, in subjecting the Feudal Lords to the jurisdiction of the Royal Law-Courts.

He expelled the Bishops and other Clergy from seats in the Parliament, the Royal Law-Courts, and followed the policy

of his grandfather in appointing only lawyers to civil office. He fixed the supreme Law-Court of appeals at Paris, and made it the great central organization for the registering of the laws and the administration of justice. From his reign dates the principle that laws to be valid must be registered by the Parliament of Paris. Even the edicts of the Crown must be registered before they were law. Conflict between the Crown and Parliament over this point was avoided by the custom of the Crown to issue no edict not beforehand advised and approved by the Crown lawyers.

The attitude of the King toward the Papacy brought on, at the end of the thirteenth and the beginning of the fourteenth centuries, the historic struggle with Pope Boniface VIII. Philip undertook to levy contributions upon the Church property in France, and in the year 1296 Boniface forbade the Clergy generally to pay any aid, contribution, or impost to the civil power and threatened any Prince who should undertake to require the same from the Clergy with excommunication. The King took this as aimed specially at himself, and answered it with an ordinance forbidding the export of gold, silver, jewels, or anything of value from France without the Royal consent. Rejoinder and then surrejoinder followed this answer until at last the Pope made the Mediæval assertion that the Pope was superior to all Kings, and the King declared that in things temporal the King was without any superior.

This controversy and, finally, conflict led to two world-historic results. The first was the assembly in 1302 of the Etats-Généraux, the Estates General of France, and the second was the capture of the Pope and his confinement at Avignon. For the first time in the history of France, upon the call of the King, the Nobles, Prelates, and representatives of the Cities met in one place, not in one body,

but in three bodies, to consider the grievances of their King and country against the Pope. Here was the opportunity for the organization of a supreme lawmaking body like the English Parliament, but no such development followed. Each body acted separately, and while the Nobles and the burghers adopted addresses favorable to the King's side, the Clergy took a somewhat non-committal position, and prayed to be allowed to go to Rome to attend the Council summoned by the Pope. The Pope at first replied mildly, but, encouraged by the victory of the Flemish burghers over the French King in the battle at Courtrai, where thousands of the French nobility perished miserably in a concealed ditch, and misunderstanding entirely the effect of this apparent disaster upon the development of the Royal power, he issued in November of 1302 the celebrated pronunciamento called in history the "Unam Sanctam," in which the Mediæval doctrine of the supremacy of the spiritual over the temporal in all things, and the immunity of the spiritual against the temporal in every respect, was again proclaimed, and then demanded of the King, under threat of excommunication, that he change his conduct toward the Church and the Pope.

This Bull created a violent commotion in France, and the King's chief lawyer, Nogaret, went to Italy and in conspiracy with the Pope's chief Italian enemies, the Colonnas, made the Pope a prisoner at Anagni, whither the Pope had gone in the summer of 1303 to escape the heat of Rome. The outrages and hardships heaped upon the old man caused his death. His successor, Benedict IX, lived but a few months, and the King now carried out his plan for transferring the seat of the Papacy from Rome to a French city. He secured the election as Pope of Bertrand de Goth, Archbishop of Bordeaux, and laid heavy condi-

tions upon him, among them was said to have been the transfer of the Papal residence to Avignon, the recognition of the right of the King to take for five years a tithe of the products of the Church property in France, and his consent to the destruction by the King of the Templar Order of Knights. The new Pope, who took the title of Clement V, was consecrated at Lyons, and after wandering about in France, really as a prisoner of the King, for a number of years, fixed his permanent residence at Avignon in the year 1309, which city remained the seat of the Papacy until 1378, and of the French Anti-Popes for forty years longer. The Pope and the Church became now an instrument in the hands of the French King.

The King now insisted upon the consent of the Pope to the destruction of the Templars, a powerful and rich Order of ecclesiastical Knights, so to speak, originating during the period of the Crusades, located first in Jerusalem, but after the Turkish advance into Palestine and Asia Minor, withdrawing to Europe, especially to France, and to Paris, where they established the great fortress called the Temple directly opposite the palace of the Louvre. The King charged them with all sorts of crimes and vices, most of which charges were undoubtedly false. They were very rich and he wanted to despoil them, and that was enough. The Pope yielded, the Order was destroyed, and many of its members put to death, and its vast treasure went into the King's coffers.

The King lived but a short while to enjoy his triumph. He died sorrowfully in the year 1314. He had builded, however, better than he himself knew. The opposition of both Nobles and Clergy to the development of the sovereign nation had been so far overcome by him as to make certain that the Middle Age in European civilization had

passed. Three sons followed him and each other on the throne, all ruling but fourteen years and leaving only daughters behind, and the question now came forward for definite solution whether a woman could occupy the throne of France. No woman ever had done so, and so the Barons and the lawyers decided that no woman was eligible thereto. This threw the inheritance upon Philip of Valois, son of a brother of King Philip le Bel.

The fact that the Barons had assumed so large a part in deciding this question seemed at first to restore them to a more commanding place than they had occupied during the reign of Philip le Bel, but the hostility of Edward III, King of England, provoked by this decision, who claimed through his mother, a daughter of King Philip le Bel, the throne of France, plunged France into the hundred years' war with England, the first effect of which was, indeed, to bring about a long period of demoralization and almost anarchy in France, but which contributed in the long run to the more complete suppression of feudal and ecclesiastical independence, the more pronounced development of the nation, and the more unlimited power of the King.

Passing over the long period of confusion, we come to the closing period of the war and the triumph of France through the uprising of the nation under the reign of Charles VII, and to the following period of the final suppression of the revolting Nobles by Louis XI. The continuous condition of war had produced a large class of professional soldiers, and out of these was now to be constituted a standing Army subject solely to the King. An assembly of the chief men of all classes loyal to the King was held at Orleans in the year 1438, at which it was agreed that the King should select from this well-trained fighting material a sufficient number of the best men to form the nucleus

of a standing Army of professional soldiers, and that he should have power to levy a tax by his own order sufficient to maintain them. The King immediately selected some ten thousand men from among these trained fighters and formed with them fifteen regiments of cavalry as the nucleus of the new standing Army. He took care not to officer them with members of the high Noble class. The King further ordered every fifty householders to furnish him one free archer to become a paid soldier whenever called for. According to the then existing population of the Kingdom, this levy with the fifteen regiments of cavalry would give the King a standing Army of from eighty to one hundred thousand men. The King also proceeded through his lawyers to invent a system of taxation for the support of this formidable force, a system entirely independent of the aids or grants of any man or body of men. Finally, in the same momentous year, 1438, the King summoned a National Church Council to meet at Bourges, which Council issued the well-known "Pragmatic Sanction" of Bourges, according to which the Royal authority over the Church in France was declared superior to the Papal, appeals to Rome were forbidden, the annates abolished or at least suspended, and the power of the Pope over ecclesiastical appointments placed under strict limitations. Charles VII, lazy and incompetent as he was, had thus paved the way well for his masterful successor, Louis XI.

From a purely personal point of view Louis XI was probably the meanest, most contemptible little sneak that ever sat upon a throne, but from a political point of view he was, considering the conditions of his age, one of the greatest statesmen whom the world has ever produced. He never lost out of sight for one moment the great purpose of his great policy, viz.: to elevate the mass of the people, to

suppress the privileges and powers of the Nobles, and to protect the National Church against the powers of the Pope and the Curia. It cannot be said that his purpose in elevating the common man was to give him liberty over against the throne, but only immunity against the power and privileges of the Nobles. He appointed chiefly lawyers and burghers to office. He elaborated his father's system of Royal taxation. He substituted hired soldiery for the free archers and constituted an Army, thus, entirely subject to his own will. His tax system brought him in more than double the revenue which his father had ever gathered, and his Army was twice the size of the force constituted by his father. He had plenty of money always coming in and, as he was economical to the point of niggardliness, he always had money on hand for any enterprise. He was liberal to the Church, but he held a strong hand over it. We may say, finally, that at the end of his reign his Government was absolute. The Church had through the demoralizing influences of the Renaissance and the great schism lost its power over King or people. The Etats-Généraux had dropped out of existence, and the Judicial tribunals, the Parliaments, were in the hands of the King's own men. All the Mediæval means of limiting Government had disappeared and there was nothing left in principle but the King and the nation, and the King was supreme over the nation.

The English development proceeded a little differently, but came momentarily, at least, to the same result. During the second quarter of the fifteenth century, the four essential limitations upon the Monarchy were the Free Cities, the Feudal Barons, the Parliament, and the Church.

The Free Cities were local self-governments based on a broad participation of the citizens in the Government;

the Barons still wielded the powers of local Government in their baronies and kept such large bodies of retainers as to be almost termed small standing armies; the Church maintained its Mediæval independence over against the Royal Government and its connection with Rome and the Papacy, recognizing the supremacy of the Popes and the ecumenical Councils; and the Parliament clung to its power of legislation, taxation, and to its position as supreme Judicial body.

It was the civil war of some thirty years' duration from 1455 to 1485 between the houses of Lancaster and York, over the succession to the Crown, which gave the Monarchy the opportunity to free itself from all these limitations and make itself absolute. In this war the Noble houses suffered so severely that the Barons were no longer able to maintain their independent local Government over against the King, or to keep their great bands of retainers now declared unlawful by the King, or to resist his will in Parliament. This was the key to the whole situation and when Henry VII, the Lancastrian claimant, overthrew Richard III at Bosworth in August of 1485, the Parliament was compelled to ratify his claim to the Crown and settle the same, in so far as its power went, in the heirs of his body, before his marriage to Elizabeth, heiress of York, gave him any claims from that quarter. From the very first, Henry VII, founder of the Royal House of Tudor, addressed himself consciously to the problem of making the Kingship hereditary in his descendants and absolute in its powers. The relation of the King to the Parliament at that stage in the development of the political history of England gave a powerful personality on the throne ample opportunity for subordinating Parliament to the King. In the first place the Barons in the House of Lords had been so

shorn of their independence in the civil war, the War of the Roses, that they did not dare to oppose the will of the King. The King enforced rigidly what was called the Statute of Liveries, Edward IV's order against the keeping of bodies of retainers, little standing armies, against the Barons. He caused their Feudal strongholds to be demolished, and he himself possessed the only train of artillery in the Kingdom, by means of which he was more than a match for all the feudal military which the united Barony could bring against him. In the second place, the King was in position to control the membership of the House of Commons by reorganizing the governments of the Cities through royal charters of municipal Government, recently invented by the Crown lawyers. These charters vested municipal Government in the hands of a few persons selected originally by the King and exercising afterward the powers of a close corporation. The members sent by these Municipalities, upon the Royal call, to the House of Commons were, naturally, supporters of the King, as much so as the Barons summoned personally by writs issued by the King. Moreover, the method of procedure in legislation furnished the King with further means of control. For example, the Parliament could assemble only upon the King's call, and he could prorogue and dissolve it. Then, when assembled, the theory of its action was that the Commons petitioned the King and that the King legislated with the advice of the Lords. It was not even settled that the Commons had the exclusive right of petition for the enactment of law, or that the King could not ordain law without petition from any source, or that the King could not dispense with the execution of a law temporarily or permanently. All these loopholes were made use of by Henry VII to rid himself of the limitations of Parlia-

mentary power over the Royal will, while as to its power over taxation, the King undertook to levy tribute in ways not subject to Parliamentary control, by benevolences, forced loans, customs, etc. In fact, Henry VII ruled without summoning any Parliament for most of the last decade of his reign, and left a treasure amounting to some ten millions of dollars to his successor.

Henry VIII succeeded to the throne without question, on the principle of hereditary right, and in the beginning of his reign gave great promise of ruling with benevolence and liberality. Under the influence of his great Minister, Cardinal Wolsey, however, he was shy of Parliamentary participation in his Government, and omitted to call Parliament whenever he could possibly manage to get on without it. He succeeded in emancipating himself from every limitation upon his absolutism except that imposed by the Church. During the first years of his reign, he manifested no purpose of freeing himself from this. As we have seen, he entered into a polemical struggle with Luther as defender of the Roman Catholic faith and received this title from Pope Leo X. It was not until he desired to rid himself of his Queen, Catherine of Aragon, who was homely, sickly, and some five years his senior, that he entered upon that course of hostility to the Pope which brought about finally —I will not say the English Reformation, but the Act of Royal Supremacy, the nationalizing of the Roman Catholic Church in England under the papacy of the King.

Nor will I undertake to say whether personal or political considerations weighed heavier with Henry in carrying out his purpose. I think the King was really troubled both by the lack of a male heir and by the anti-Spanish policy of Wolsey.

Wolsey's idea was to checkmate the power of the King's

nephew, the Emperor Charles V, by bringing about the marriage of Henry with a French princess. It is even suspected that Wolsey had some idea of becoming Pope himself through the success of such a policy. At any rate, he favored the divorce so long as he thought that the French marriage would follow it, but when the King took things into his own hands and announced his purpose of taking the pretty Anne Boleyn for his Queen, Wolsey showed signs of opposition, and was immediately banished from his high place. Thomas Cromwell, one of Wolsey's subordinates in office, was made his successor, and became Henry's successful agent for carrying the Tudor absolutism to its highest point of consummation. He was a man of low birth, who found his way early into the service of the Marchioness of Dorset, and then went to Italy and joined one of those bands of ruffians known at that time in Italy as "Compagnie di Ventura." He was a man of remarkable intelligence and will-power, and he learned readily in Italy the politics of Machiavelli and the Medici. *The Prince* of Machiavelli was his political bible. He was the man who first suggested to Henry to solve the divorce question by proclaiming the independence of the Church in England against the Pope and the Curia, and assuming the headship of it himself. It is recorded by the historians that Henry shrank, at first, from taking so radical a step, but when the thought became familiar to him it lost its terrors and was finally embraced.

How to bring this vast change about was now the question. Cromwell, unlike Wolsey or Henry himself, did not fear the assembly of Parliament. He understood how to pack the Parliament with his own adherents by the power of the Crown in the issue of the writs of summons and he knew how to manage its proceedings when assembled. It

was no difficult matter for him to secure from Parliament the Act of Supremacy of the year 1534. He first bullied the Clergy by declaring that they and the whole nation had made themselves subject to the penalties of the Statute of Præmunire for recognizing the authority of Wolsey as Legate of the Pope. Under the terror of his threats of punishment for the commission of this trumped-up crime, he forced the Clergy to pay a fine amounting to a million pounds sterling of the present coinage, and to give a silent assent to the claim of the King to being the "Protector and only supreme head of the Church and Clergy of England." The King then expelled Queen Catherine from the palace, and Cromwell forced the Clergy in Convocation to propose to Parliament the withdrawal of the first-fruits of the bishoprics in England from payment to the Pope, and in case the Pope should refuse to recognize the Bishops who failed to pay them, to withdraw the obedience of the King and people of England from the Roman See. The Parliament passed the Act to this effect, to be executed at the discretion of the King. Pope Clement, however, stood firm, rebuked the King for his adultery with Anne Boleyn, and ordered him to restore the lawful Queen to her place. Disregarding the command of the Pope, Henry married Anne Boleyn. Cranmer, the new Archbishop of Canterbury, declared the former marriage of the King invalid, and a few days later crowned Anne as Queen, and Parliament declared the King to be the Supreme Head of the Church in England, and placed in his hands the unlimited control in its Government. The last limitation upon the Royal power and authority had now fallen, and the absolute Monarchy in England was now an accomplished fact.

The development of the Monarchy proceeded much less

rapidly in Germany and Italy and took also quite a different turn because of the restraining influences both of the Empire and the Papacy. After the failure of the three Houses of Franconia, Saxony, and Hohenstaufen to make the Empire an hereditary Monarchy, the German King was chosen by the Feudal Princes and became Emperor by Papal coronation in Rome. Then a certain ring of the greater Princes assumed to nominate the candidate for the German Kingship to the whole body of the Princes. Finally this nomination became the election and the approval of the larger body fell into desuetude. In 1338 the Electors declared that the person chosen by them was Emperor, as well as King, without the Papal coronation. In 1356, by a resolution known in history as the Golden Bull, they made the body of Electors to consist of the Archbishops of Mayence, Treves, and Cologne, the Count Palatine of the Rhine, the King of Bohemia, the Duke of Saxony, and the Margrave of Brandenburg. With these developments it became utterly impossible for the Empire to grow into a national absolute Monarchy, or even for the German Kingship to do so. The Revival of Learning and the Reformation, by weakening the influence of the Church and of religion and dividing the Empire politically into a Protestant body and a Catholic body, made the development of the Empire and even of the German Kingdom into a confederacy of states unavoidable. This result was consummated by the Thirty Years' War and the Westphalian compact of 1648. If after this there was to be any revival of Monarchy in Germany and Italy, it would be neither Imperial nor national but local.

The state which took the lead and set the example in this was Prussia, under the capable and enlightened rule of the House of Hohenzollern. This great House of Swabian

origin won first the Burgraviate of Nuremberg, and from this foothold secured the Margraviate of Brandenburg, and from this latter foothold in North Germany secured the Grand-mastership of the Teutonic Order, which governed East Prussia under the overlordship of the Polish King. The Margrave of Brandenburg, one of the Electoral Princes, was made by the Reformation head of the Church in his domains and real defender of Protestantism. By the Westphalian pact his state became a real sovereign body in confederation with the other states of the Holy Roman Empire of the German Nation. By force of arms he drove the Swedes, who during the Thirty Years' War had occupied Pomerania and other parts of North Germany, back into their peninsula and freed himself from the overlordship of the Polish King. East Prussia was thus the first among the territories forming the later Kingdom to become an entirely independent state. For all the other parts of his dominions the Margrave of Brandenburg was still a member of the Holy Roman Empire, presided over by the Archduke of Austria. It was quite natural, therefore, that in assuming the Kingship, in 1701, the Margrave gave his Kingdom the name of Prussia instead of Brandenburg. King Frederick I prepared well the way for his successor, Frederick William I, and the latter for Frederick II, the Great, under whom the Prussian Monarchy reached its full absolutism.

As I have already described the process in attaining this result in the cases of the Monarchies of Spain, France, and England, I will only dwell upon those points in which Prussia offers some peculiarity. As the Teutonic Order was a Military Order, the Government of Prussia in the narrow sense, that is, East Prussia, was from the first of the nature of the commandership in chief of the Grand Master. That

the methods and means employed in East Prussia should be extended gradually to the other parts of the complex forming the Prussian state in the large sense was more than natural. It was necessary. Prussia was thus a state in which the natural order of things was the supremacy of the military organization over the civil, and this meant the absolute Monarchy of the commander-in-chief. The Hohenzollerns solved the problem, however, of subordinating the Feudal Lords to the Crown in quite a different way from that followed by the Spanish Hapsburgers, the Valois-Bourbons, and the Tudor-Stuarts. They did not destroy their nobility in order to found their absolutism on a purely bourgeois basis. They were wise enough and clever enough to see that this meant, in very large degree, the destruction of intelligence by brute force. They did far better. They officered their standing Army with their nobility, bringing them thus under the military absolutism of the King and, through the strenuous life thus imposed upon them, restraining them from idleness and dissoluteness, the bane of the aristocracy. So effectual was the Hohenzollern system that the King did not find it necessary to bring the people, through compulsion, under his supremacy as head of the Church, and Prussia furnished us the unique example of the absolute Monarchy with freedom of religion. This was the peculiar trait of the Monarchy of Frederick the Great. Prussia became thus the real representative of the Protestant principle in religion and of the intellectual Monarchy in politics. No other state of the Holy Roman Empire was able to compete with Prussia in these respects. In North Germany there was only Saxony which might have done so, but the reconversion of its Princely House to Roman Catholicism created a hostility between Prince and people which rendered the

development of the Monarchy, in the Prussian sense and strength, impossible.

The states of South Germany still remained after the Peace of Westphalia under Papal influence and control, and no South German Prince was able to realize the Monarchic system according to the Prussian model. Austria was under the same limitations. Joseph II tried in vain to follow the example of Frederick the Great, but, both he and his people being Roman Catholics, he could not only not claim the headship of the Church, but must himself recognize the headship of the Pope. The ethnical variety, also, of his subjects made it next to impossible to weld them into a real nation. And so the efforts of Maria Theresa and of Joseph II were only partially successful, and Austria never attained the real absolute system which would have fused the different ethnical elements into a harmonious whole and have produced a consensus of national opinion, upon which a real popular political system can be finally established.

Italy was even less fortunate. The bonds of the Empire having been practically entirely loosed, Italy fell into five principal states: Milan, Venice, Florence, Rome, and Naples. In these, economic and social differences produced somewhat different results. In Milan the aristocratic family of Visconti succeeded in winning the autocratic power in that and the surrounding Cities and in forming the Duchy of Milan, with which he was, at the close of the fourteenth century, formally invested by the Emperor Wenzel. This investiture was more for the purpose of creating the show of legitimacy and for securing the devolution of power by hereditary right than for conferring any real power. The founder of the House of Visconti, Giovan Galeazzo, owed his power to his own cleverness in

political manipulation and to the success in arms of the hired soldiery which his own private wealth enabled him to keep in his employ. He aspired to unite the whole of Italy under his absolute rule, but Venice checked him on the East and Florence on the South. He succeeded, however, in transmitting his power to his son Filippo Maria, and this latter also succeeded in transmitting it to the husband of his only child, Francesco Sforza, his chief Capitano, who made the Duchy a military state of the most tyrannic type, an absolute Monarchy based entirely upon physical force and terrorism.

Venice, on the other hand, furnishes the type of a very different development. On account of its insular position it escaped German conquest and the Feudal System following it; and on account of its maritime position, it became a Republic of merchants engaged chiefly in foreign trade. An executive chosen for life, the Doge, was one of its earliest institutions, and the inevitable result of the pursuit of foreign commerce was the development of an aristocracy of wealth, which, because among other things of the nature of the policies to be dealt with and the constant absence of a large part of the middle class on the maritime voyages, would wield the powers of Government as their own exclusive right. The plutocratic Council, composed of members holding by inheritance, and its executive committee, and the Doge chosen by the Council for life, constituted the Government of Venice. It was a wonderfully intelligent and capable Government, and it maintained against all possible attempts of Cæsaristic democracy an aristocratic Republic of a very successful and prosperous kind. The decay of Venice is not to be ascribed to the nature of its Government, but rather to the fact that the discovery of America and of the way to India around

the Cape of Good Hope and the closing of the Levant by the Turks ruined its commercial supremacy. The extension of the Government of the Venetian Republic over the Eastern Valley of the Po was also a cause of weakness. It introduced a different social element and new problems for an island commercial state. With the Dogeship of Francesco Foscari it attained the summit of its greatness and declined from that moment until it became a province of the Hapsburg Monarchy.

It is the development of the Florentine Republic into the Dukedom of Tuscany which excites greatest interest in the student of political science. Florence emerged from the Imperial control as a broadly aristocratic Republic under della Bella's Constitution established in the last decade of the thirteenth century. Having become practically an independent state, the necessities of such a Government made for concentration of power, especially in time of war or civil conflict; and a certain part of the aristocracy, the more capable personalities, very naturally came to hold the public powers. This part or circle was organized about the noble family of the Albizzi. Under their lead the aristocratic party expanded the City Republic into the Republic of Tuscany and opened the way for it to the sea at Livorno. Prosperity and the prospect of continuing prosperity were most satisfactory and promising, but, as usual, there was another aristocratic family in Florence, which was ambitious to displace the Albizzi in the control of affairs, the Medici, the great bankers of the City. Under the pretext of elevating the lower classes to participation in the Government, and under the appearance of declining or of not seeking office for themselves, the first four heads of the Medici, Salvestro, Vieri, Giovanni, and Cosimo, labored incessantly for fifty years, 1380–1430, to gain wealth and

organize a party, the democratic party, with themselves as its permanent head: as we would now say, as its boss. They succeeded in bringing most of the tradesmen and artisans of the city under some sort of financial obligation to themselves through the transactions of their great bank, and down to the era of Lorenzo they lived simply themselves, gave largely and cast their bread freely upon the waters, awaiting patiently the day of its return with interest compounded many times over. They preferred the permanent headship of the party which elected the Magistrates to the offices themselves with their short terms and their responsibilities. They became thus the real permanent rulers of the Republic without incurring the burdens and the uncertainties of governmental office, and were able always to find a scapegoat for every failure, mistake, or misfortune. Moreover, to have all of the offices at their disposal was a far more important thing for their purpose than to occupy a single one, however powerful.

That purpose was to use the Government for their own private advancement, and finally to change the Republic into the hereditary Principality of the Medici. The astuteness with which they worked all the means of corruption within their hands under the form always of deference to the people—the poor, dear, deluded people—was positively infernal, and their success was absolutely diabolical. The methods which they followed in changing the most jealous Republic which the world has ever produced into the Medician Principality, ruled absolutely by Lorenzo the Magnificent, gave Machiavelli the material for his noted, though very variously understood, and very variously appreciated, work, *The Prince*, and they leave nothing to be added in the science of deception, trickery, flattery, and manipulation of all weaknesses and corruption. It is

the greatest example in history of the circumvention of physical force by unscrupulous shrewdness.

The failure of right heirs in the Angevan line of Kings in Naples made that Kingdom the prey of war during the first half of the fifteenth century, between René of Anjou and Alphonso of Aragon. Alphonso with his Spanish soldiers won the day and established the military Monarchy of the foreigner in Naples. The King, it must be said, ruled with benevolence, and was also a great patron of letters and art. He was, however, an absolute Monarch of the sixteenth-century type.

Finally, this development in the other Italian states made it necessary for the Pope to consolidate the States of the Church and organize them in Monarchic unity so as to prevent the head of the Church from becoming subject to a despotic secular Government. This policy, beginning with Pope Nicholas V, who about the year 1450 re-established the Papacy in Rome, after the seat of it had been for more than a hundred years in Avignon and Florence, was brought to its culmination by Alexander VI, Borgia, who was thought to be planning to make his son Cæsar absolute Monarch over all Central Italy when death called him from earthly employment in the year 1503. The despotism of the Papacy in the States of the Church was theocratic rather than military, and while it was naturally more benevolent, it was also even more absolute. The Church was inclined to limit secular Government outside of the States of the Church, but inside of them its limitations could be only self-limitations—in other words, benevolent despotism.

The revival of the Monarchy in Sweden followed swiftly upon the withdrawal of Sweden from its Mediæval union with Norway and Denmark, under the leadership of the

capable young Nobleman, Gustavus Vasa, in the first quarter of the sixteenth century. By the help of the citizens of the towns and the peasantry of the country, he recruited a strong standing Army with which he defended the national existence of Sweden against the Norway-Danish supremacy and held his own Nobles in subjection to the Crown; and by the defense of Protestantism and the confiscation of the property of the Roman Catholic Church he made himself head of the Swedish Church and enriched the Royal treasury. In 1554 the Swedish National Assembly established the right of his family to the throne and his two great descendants, Charles IX and Gustavus Adolphus, carried the restored national Monarchy to the highest point of its absoluteness.

In the Kingdom of Denmark-Norway this development had accomplished itself even earlier. In fact it was this which caused the withdrawal of Sweden from the Scandinavian union. Christian II, King of the three divisions of the Union, had, through similar means to those later employed by Gustavus Vasa in Sweden, developed the absolutism of his Monarchy to such a degree as, in the feeling of the Swedes, to have violated the pledges of the Articles of Union of 1397. This feeling it was which caused the withdrawal of Sweden from the Union in 1521–23. After this Norway remained in union with Denmark until the close of the French Revolution, and, in conjunction with it, was subject to the absolute Monarchy of the Danish House legitimatized by the Lutheran Church system.

The Middle Ages may be said to have closed politically in Russia during the first quarter of the seventeenth century, when the Feudal Lords elected Michael Romanoff King, or Czar, and made the Crown hereditary in his family. There was little city life comparatively in Russia at this

period, and consequently no sufficient burgher class for the Monarch to rely upon for defense against the decentralizing power and disposition of the Nobles; and the peasantry were too deeply sunken in ignorance and apathy, and too absolutely absorbed in local existence, to be taken into account in the formation of any Royal internal policy. The King, or Czar, was thrown upon the Nobles and such foreign soldiery as he could hire, and he adopted something like the later Prussian practise of making the Nobles military officials, placing them thus under the absolute power of the Czar as Commander-in-Chief and securing their services for the Monarchy. During the rule of Michael, his own father was recognized as the Primate of the Russian Church, and so conducted the ecclesiastical affairs that they proved little, if any, limitations upon the absoluteness of the Monarch. When this family relationship between the Czar and the Primate passed away, as it did very soon, the Czar found it necessary to get a firmer grasp upon the Church himself, and Peter the Great in the early part of the eighteenth century abolished the separate Church primacy and made himself head of the Church in Russia after the model of Henry VIII in England. He it was who put the finish upon the Russian system and made it a military Monarchy backed by the ecclesiastical power—in other words, a Jure-Divino despotism.

The revival of the Monarchy during the fifteenth, sixteenth, and seventeenth centuries had unquestionably many beneficial results to general civilization. It restrained, in considerable degree at least, the privileged classes from oppressing the common subjects. It improved the condition of the common man. It developed the feeling and the idea of national unity and of the nation. It substituted one law for a variety of Feudal customs. It introduced the

distinction between private property and public office. But from the point of view of our problem, the reconciliation of Government with Liberty, it did nothing, at least nothing directly. It sacrificed Liberty completely to Government in that it made Government sovereign. The great Mediæval institution which had been the chief defense of the Individual against the arbitrariness of Government had itself become subordinated to the power and control of the Monarch, in greater or less degree, everywhere; and the Mediæval Legislatures and Courts had ceased to be called together or had become Royal institutions entirely under the King's control. It was not possible, therefore, that this should be the final solution of the great problem, the last word in the development of constitutional law and political science. It simply brought about that national unity and national consensus on the part of the people at large necessary to another vigorous and more conscious effort for understanding, and for bringing into their proper relations, the three great concepts of political science, the three great forces of political and general civilization, viz.: Sovereignty, Government, and Liberty.

CHAPTER IX

THE REVOLUTIONS

However helpful to the cause of absolutism in Government the early consequences of the Reformation were, still the fundamental principles of it, as of the Renaissance, or New Learning, were the direct contradiction of both the principle and practise of the absolute Monarchies. The freedom of individual thought and inquiry was the basis of both these movements, and while it addressed itself to the transformation of letters, art, science, and philosophy in the one case, it sought the like transformation of the religious conscience and the ecclesiastical system in the other. Such a movement could not fail to extend finally to the political system and seek its transformation also.

Where the spirit of the Renaissance attacked the Monarchy, the exaggeration of Individual Liberty fostered by it threatened to plunge the state into anarchy. On the other hand, where the real spirit of the Reformation attacked it, the discipline of the religious life and the self-culture produced by it led the whole course of the revolution within safe lines. The contrast offered by the English and German revolutionary movement to that of France and Italy is to be explained chiefly in this way.

The Revolution accomplished itself in England a full century before it did in France. We may place the beginning of it as far back as 1620, when King James I entered upon the policy of connecting Spain, the stanch supporter

of the Roman Catholic Church, with England both diplomatically and by the marriage of Crown Prince Charles with the Spanish Infanta. King James seems to have fallen under the influence of the Spanish Ambassador, Gondomar, who made him understand that the best way to secure the permanence of the absolute Monarchic system was by placing it on the Jure-Divino basis, which Orthodox Catholicism alone could supply. Already fifteen years before this the Parliament, which the King had been forced to assemble to help him out of the financial straits caused by the war debt created by his predecessors and by his own excessive extravagance, had disputed the King's right to levy and collect duties on imports and exports, although the Exchequer Chamber of the Royal Courts had decided this question flatly in favor of the King's prerogative, and also the King's right to absolute power over the Church. It was the attitude of the Parliament upon the latter point which caused the King to dissolve it in 1610 and to hold out four years longer without summoning another. The Parliament of 1614 was, however, even more determined than its immediate predecessor to put an end to absolutism in taxation and Church Government. It was in this Parliament that Eliot, Pym, and Wentworth first appeared on the stage of the constitutional struggle. The King was almost terror-stricken at the tone which the Commons assumed. He quickly dissolved this Parliament, sending some of the leaders of the Commons to the Tower, and ruled for seven years more without a Parliament. During this period the King quarrelled with the Supreme Judges for attempting to hold the ecclesiastical Courts within legal limits, and expelled the Chief Justice, Sir Edward Coke, from his high office, because he refused to recognize the claim of the King to be consulted in regard

to decisions involving the Royal prerogative before they should be rendered. The Courts as well as the Parliament now began to be inspired with hostile sentiments toward the King. But more dangerous to the throne than all these things was the immorality of the Sovereign and his Court. The King was himself a drunkard and a libertine, and the orgies of Whitehall became the sport of the public and of the stage. He was deeply in love with a handsome young adventurer, George Villiers, whom he was constantly embracing and covering with kisses in the most open and shameless manner and whom he made Duke of Buckingham and chief Minister of the Crown. Through his disgusting conduct all reverence for the throne was destroyed and universal popular contempt took its place. Such was the temper of the nation when the King entered upon his Spanish policy under the direction of Buckingham and summoned the Parliament of 1621.

This Parliament demanded war against Spain and a Protestant wife for Prince Charles. The King angrily refused the demand, forbade the discussion of the foreign policy of the Kingdom by Parliament, and threatened the leaders with imprisonment. The Commons adopted a strong protest against being denied the right of discussing any question involving the welfare of the nation and recorded the same in its minutes. The King sent for the Journal of the House and tore the resolution out of it with his own hand, and then dissolved the Parliament.

The Prince, accompanied by Buckingham, went to Madrid to claim the Infanta and take her back to England, but the Spanish King procrastinated and finally the Minister, Olivarez, told the Prince that Spain must never assume a hostile attitude to the policy of the Roman-German Emperor—in other words, that Spain must always

uphold the orthodox Roman Church against the advance of Protestantism. When the knowledge of this attitude of the Spanish Government was spread through England, the nation rose almost as one man in its demand for war against Spain. The King felt obliged to call the Parliament together again, and, contrary to his ideas of the absoluteness of the Royal prerogative in the management of foreign affairs, to lay before it the Spanish situation. Both Prince Charles and Buckingham joined hands with the Parliament for Protestant alliances on the Continent and war against Spain. The demoralized King gave way, sickened and died, and Charles I ascended the throne with popular acclaim and under popular expectation that he would rule as a Protestant Sovereign. But neither Parliament nor the nation had rightly divined Charles's ideas and plans. It is quite true that he was hostile to Roman Catholicism and the Roman Papacy, but he was equally hostile to the Puritans and the genuine philosophy of the Reformation. He stood for a National Church, including by law every subject of the state, of which he himself should be the head and Pope. He placed Archbishop Laud in the position of Primate, who organized the clerical party for propagating the doctrine of the Jure-Divino Kingship. When the Parliament became conscious of these tendencies, it put Montagu in the Tower, denied to the King the usual grant of the customs during life, and refused him a subsidy. The King delivered Montagu from imprisonment, made him Royal Chaplain, and levied and collected the customs by Royal order.

At this moment appeared John Eliot, whose clear thought had fixed upon the responsibility of the Ministers of the Crown to Parliament as the central point of the constitutional struggle and was determined to establish the prin-

ciple by the impeachment of Buckingham himself. He denounced the favorite in the Parliament of 1626 for advising the King to commit unconstitutional acts, for his incompetence in office, and his corrupt and personal use of public funds. In spite of the King's threats, the Commons voted the impeachment of Buckingham, and arraigned the Minister before the House of Lords.

Eliot's powerful presentation of the case was so convincing that the King himself hurried into the House and sought to protect his favorite by assuming personal responsibility for the acts charged against him. He also ordered Eliot to be arrested and imprisoned. The Commons demanded his release, under refusal to do any public business until this should be effected. After a few days of hot struggle Eliot was set free, shorn of such offices as the King could take from him, and Parliament was again dissolved before judgment or the impeachment trial could be reached. It had, however, not voted the subsidies demanded by the King, and he resorted to the hated system of benevolences to fill the treasury. This failing, however, recourse was next had to the equally hated system of forced loans. The Commissioners for the collection of the loans found universal hostility and resistance, which they undertook to overcome by every exercise of arbitrary power.

Hampden was cast into prison because he said he feared to call down upon himself the curse in Magna Charta should he submit to having money extracted from him in this way. The situation was becoming so threatening that Buckingham advised the King to bring on a foreign war, hoping to raise the prestige of the Crown by a great military success. The campaign, in which he undertook to rouse and sustain the Huguenots of Rochelle against the French King, was a miserable failure and King Charles,

overwhelmed still further with debt, was compelled to call Parliament together again and demand subsidies.

This Parliament was the author of the famous Petition of Right of the year 1628. In this noted document, Parliament laid the foundation for the personal Liberty and security of property of English freemen. It was a demand made upon the King that all taxation, forced loans, and benevolences, without consent of Parliament, deprivation of goods, punishment, and outlawry, save by lawful judgment of one's peers, arbitrary imprisonment without stated charge, enactments of martial law in time of peace, billeting of soldiers and sailors, should cease forever, and that the Ministers and officers of the Crown should serve the King in accordance with the laws and statutes of the realm. An attack upon Buckingham, led by Eliot and Coke, disturbed the King to such a degree that he consented to yield his consent to the Petition of Right. This did not, however, save the favorite from the wrath of the Commons. They still demanded the removal of Buckingham, and the King still refused. In the ensuing wrangle over the question Buckingham perished by the assassin's dagger. As usual, however, this was no solution of the question. The aggrieved King appointed Weston, the Duke's favorite subordinate, as Lord of the Treasury, and the Duke's system of financial administration remained in force.

There was, however, a thing which the nation and the Parliament dreaded even more than the loss of personal Liberty or of property, namely, the destruction of religious Liberty. The cause of re-established Romanism was triumphant on the Continent, and the ecclesiastical system promoted by Archbishop Laud and sustained by the King looked to the extermination of all religious dissent at home. The Commons were engaged in a most serious de-

bate over the subject when the Speaker was handed an order from the King to adjourn. The members locked the doors of the House and held the Speaker down in his chair until the resolution was passed declaring any Minister of the Crown a capital enemy to the Kingdom and the Commonwealth, who should propose innovations in religion or advise the collection of taxes not granted by Parliament, and every subject of the realm a betrayer and an enemy of English liberty, who should voluntarily submit to such acts and demands. Thus ominously ended the Parliament of 1629, the last to be assembled for eleven years succeeding its dissolution.

By order of the King the leaders of the Constitutional party in the last Parliament were thrown into prison where Eliot soon died, and the King began through two powerful agents, Wentworth and Laud, that very Wentworth of Yorkshire who had begun his public career as a stanch Constitutionalist, but who now became the most zealous promoter of Royal absolutism, to invent a scheme of Government which would free him from the necessity of ever calling another Parliament. The chief work of Wentworth was to be the creation of a Royal standing Army and a Royal treasury independent of Parliamentary authority and Parliamentary grants, while Laud was to overcome all religious dissent and enforce religious uniformity.

The Royal Exchequer now entered upon a course of general extortion. Knighthood was forced on the Gentry in order to make them pay a definite fine in order to exempt themselves from indefinite aids. Every person who had built a house outside the limits of London, as prescribed by James I, was forced to pay three years' rent. Marriage within forbidden degrees was heavily paid for in money. The Star-Chamber jurisdiction was turned into

a means for filling the treasury. Monopolies of all sorts were created and sold. Quarrels and fights between persons of high rank were visited with severe money penalties. Customs were levied and collected on exports and imports. Benevolences and loans were demanded. And, finally, an old precedent according to which the port towns and maritime counties loaned vessels for naval war was declared to give warrant to the King to levy taxes on these parts of the Kingdom for the building and maintenance of a regular Royal Navy.

Wentworth, later named by the King Earl of Strafford, soon grew restless, however, of these petty retail methods. He evolved a larger plan. His idea was to take advantage of the situation in Ireland, where the Catholics and Protestants were much more evenly balanced than in England, and where each party in its hostility to the other was forced to a thorough dependence on the Crown, to create a Royal Army and an independent Royal treasury. The King appointed him Lord-Lieutenant of Ireland, and in a short time he had established in Ireland the model for the absolutism of Charles in England.

At the same time Archbishop Laud was carrying out his scheme for the English National Church as a branch of the universal Church of which the Roman Church was only another branch. He could not conceive of a Church without Bishops as the media through which the Apostolic grace and power were transmitted. He, therefore, insisted on conformity, that is, upon the destruction of Puritanism, whose chief form at the moment was Presbyterianism, in Church Government, a form differing from Episcopalianism chiefly in the absence of Bishops, Bishops' Courts and elaborate ritual, but not disputing the principle of a National Church, that is a Church of which all subjects of the state

should be by law members. Laud all but succeeded, by driving the Puritan Ministers out of their pulpits, in re-establishing the exclusive Episcopal hierarchy and the ecclesiastical supremacy of the Crown. He went so far as to move the King to establish the Bishopric of Edinburgh and to issue a book of canons for Scotland, which abolished the Presbyterian system of that Kingdom.

The high point of submission to these assumptions in civil and ecclesiastical Government was reached in the year 1636. In 1637, the resistance began which was to end in revolution. The Scots repudiated the re-established Episcopal system, and John Hampden refused to pay the ship-money tax levied upon him. In the latter part of this year Hampden's case was argued before the full bench. The decision was rendered in the spring of 1638. The Court vindicated the Royal authority to tax, without regard to Parliamentary prohibition or limitations, and pronounced void all Acts of Parliament militating with the King's prerogative to defend his Kingdom in the ways and through the means selected by himself.

The irritation against the Judges produced by this decision was deep and wide-spread. The nation now saw and felt that it must do battle for its liberties. Matters were already seething in the North. The demand of the King for the submission of the Scots to the ecclesiastical Establishment was met by the Covenant entered into by a great host in the Gray Friars Churchyard in Edinburgh to restore Presbyterianism and expel the Bishops from the land. The Covenant was subscribed to, practically, by the Scotch nation, and it contained finally the demand upon the King for the assembly of a free Parliament. The King doggedly refused and prepared for war. The Scots had, however, anticipated him and a good army of ten thousand conscien-

tious men, under the command of Leslie and Montrose, met him at the frontier and offered him battle. The King was overawed and, instead of fighting, promised to assemble Parliament. The Commons again refused the King's demands until their grievances should be satisfied and, after a few days session, the Short Parliament of 1640 was dissolved and with the Irish troops and subsidies brought by Strafford the King undertook the renewal of the struggle.

But the Scots were already over the line in Newcastle and in position to dictate terms, for the King's troops were deserting and England was practically on the point of insurrection in his rear. There was nothing left for the defeated and deserted King to do but to assemble Parliament, the Long Parliament of 1640. As the leader of the Commons in the Parliament appeared the Somersetshire Gentleman, John Pym, the sole remaining member of that band of five, who had stood out in the Parliament of 1620 for constitutional Liberty with so much vigor, Coke, Cotton, Eliot, Wentworth, and himself. Wentworth was indeed still alive, but as the Earl of Strafford he was more than dead in his old character. Pym was the man who foresaw the whole course which the Revolution must take in order that it should proceed according to the forms, or at least fictions, of law, which is always a necessary condition for the success of anything requiring the approval of English thought. Pym's idea was that Parliament was superior to the King, since the earliest Parliaments of English history chose the King, and since the later Kings held also chiefly by Parliamentary title, and that, therefore, if the King would not act with the Parliament, Parliament might regard the refusal as abdication and proceed to create, temporarily, at least, another executive agent. For all this he had historical precedent. But he went further and

took his stand on the principle that the Commons were of more importance than the Lords in the Parliament and, if obstructed by the Lords, might act alone. For this he had no precedent, and could not appeal for justification to history. We of to-day can see that, while in this he was not true historian, he was indeed true prophet.

When this Long Parliament opened in the autumn of 1640, it was immediately buried under petitions for redress from almost every constituency in the Kingdom. Nearly fifty committees were necessary to examine and report upon them. The Parliament then proceeded to undo the whole system of absolutism which Strafford and Laud had built up. It abolished the Courts of Star-Chamber and High Commission, deprived the Privy Council of the King and many inferior tribunals of their irregular and arbitrary jurisdiction, pronounced ship money and all import and export duties levied without consent of Parliament illegal, ordered the assembly of Parliament every three years, without Royal writ, if necessary, threw Laud into prison, and by a Bill of Attainder sent Strafford to the executioner's block, and resolved that the existing Parliament should not be dissolved without its own consent thereto.

Terror-stricken, the King gave way before this resolute advance, but with a heart full of anger and revenge. The Scotch Army was now paid by Parliament and it withdrew from the northern border, and the King felt himself freer. He proceeded to Edinburgh and conciliated the Scots by yielding to their every demand, and then spoiled it all again by intriguing with the Earl of Montrose to restore his arbitrary power in Scotland.

At the same time the fall of Strafford had left Ireland in a state of anarchy, and the battle between Catholic and

Protestant began. The massacre was almost indescribable. The King looked upon the situation as a warning to England of what would happen when his Government should disappear, but the Parliament considered it a part of a Royal scheme for the restoration of Royal absolutism. Nevertheless, a certain reaction in the King's favor set in, and it was with much difficulty that Parliament passed the Act called the Remonstrance in November of 1641, in which it was declared that Parliament had no design to abolish Episcopacy, but only to lessen the powers of the Bishops, secure the enforcement of existing laws against Papists, and the due administration of justice and also the appointment of Ministers of the Crown in whom the Parliament had confidence. The Commons, however, passed a bill by a practically unanimous vote to expel the Bishops from the House of Lords. This was highly resented by the King and the Bishops, and the contest over the question resulted in riot and bloodshed and the mobbing of the Bishops themselves. The King undertook to arrest Pym, Hampden, and several others of the leaders of the Commons. He even appeared himself in the House with a retinue of courtiers for the purpose, but they had all escaped and the Royal conduct only diminished the reverence for the throne.

The people regarded the act of the King as threatening the safety of Parliament, and armed bands began to gather around the buildings for its defense. The King now determined to disperse Parliament and maintain the throne by military power. He withdrew from Whitehall and began to collect forces by Royal commissions. The Commons intimidated the Lords until the latter agreed to the bill for excluding the Bishops from the House of Lords; and the Parliament appointed Lord Lieutenants of the

militia in the Counties and organized an Army independent of the King. Both King and Parliament violated in these acts constitutional precedent. The King's partisans now withdrew from the Parliament and betook themselves to the King's camp at York, and the Parliament created as Executive power a Committee of Public Safety, of which Hampden, Hollis, and Pym were the chiefs.

The first battle, that at Edgehill in October of 1642, was indecisive. During the year 1643 the victory seemed inclining to the side of the King. The death of Hampden at Chalgrave was a severe loss to the cause of the Parliament. These experiences, however, brought Pym and his associates to the conclusion that they must gain the aid of the Scots by making Presbyterianism the State religion of Parliamentary England. This was effected through the Covenant entered into at the close of the year. This was the final work of Pym, whose death left the execution of the agreement in the hands of the "Committee of the two Kingdoms," which thenceforth conducted the war from the side of the Parliament. In July of 1644, the preparations were so completed that the Parliamentary Army dealt the King's forces a telling blow at Marston Moor. It was Oliver Cromwell with his brigade of Ironsides—in other words, religious fanatics—who had won the day, and from this moment forward, the Revolution entered upon a more radical course. Cromwell himself was not at first hostile to Presbyterianism, but a large part of his following were men who had broken away from the idea of a National Church of any kind, and had embraced the principle of the separation of "Church and State," and the independence of each religious community. Under their influence and impelled by the course of events, Cromwell now advocated the reorganization of the Army under leaders who were not

members of Parliament, the abolition of all social distinctions in the officering of the forces, and a more vigorous prosecution of the war against the King. The policy of the Parliament had been not to destroy the King or the Kingship, but simply to drive the King to the acceptance of such limitations upon his power as the Parliament should demand.

Cromwell's idea was now to remove all political considerations from the prosecution of the military movements and wage the war for victory, victory absolute and decisive, no matter what should become of the King or the Kingship. This plan was called "The New Model," and it was adopted by the Parliament. The result was that the young and progressive Fairfax supplanted the more conservative Essex as Commander-in-Chief of the Parliamentary Army, while Parliament allowed Cromwell, though a member, to retain the command of his Ironsides for a little while. But that little while was a decisive period. Within its limits fell the battle of June 14, 1645, at Naseby, which ruined the Royal cause and brought the war momentarily to a close.

We now enter upon a new stage of the revolutionary movement, that in which the Presbyterians and the Nonconformists struggle for the mastery of the Parliament, and the King intrigues with each in turn with the purpose of restoring his lost absolutism. The organized strength of the Presbyterians was in the Parliament, that of the Independents was in the Army. It was now, therefore, a struggle between the Parliament and the Army. The King, who after Naseby had betaken himself to his Scots, was now handed over by the Commanders of the Scotch Army to a Committee of Parliament on payment to them of four hundred thousand pounds sterling. The Parliament

undertook to disband the Army and enforce Presbyterian uniformity, and the Army refused to be disbanded, created a Council of its own by electing two men from each regiment, naming them the Council of Assistants, and seized by force the person of the King. The Parliament turned furiously upon Cromwell as the instigator of these acts, and forced him to quit Parliament and betake himself to the Army. The Army now marched to London and demanded toleration for the Independents and the expulsion of eleven of the chief Presbyterian leaders from the House of Commons. While the House would not expel them, the terror-stricken inhabitants of the city brought such a pressure upon them that they withdrew, and the Parliament appointed a Committee to treat with the leaders of the Army, *i. e.*, with Fairfax, Cromwell, and Ireton. These, however, thought that their best course was to treat with the King. There was certainly profound statesmanship in this view, and they now gave the King the great opportunity of his life to save his throne and rule thereafter as a constitutional Prince. They asked of him first of all the recognition of the freedom of religious belief and worship, the abolition of privileges and monopoly, the reform of judicial procedure, the cessation of arbitrary taxation, the reorganization of the House of Commons by a more liberal suffrage and a juster distribution of seats, the triennial assembly of Parliament, the control of the Army and Navy by Parliament for ten years, and the nomination by Parliament of the Ministers and high Officers of State.

The King blindly and stubbornly pursued his idea of balancing the Parliament and the Army against each other until both should become too weak to resist his arbitrary power. The confusion grew at every moment. The London mob invaded the Commons and forced the House to

recall the eleven members whom a previous mob had required it to expel. A large number both of the Lords and of the Commons now betook themselves to the Army, which marched into London, restored the fugitive Lords and Commoners to their seats, and reopened negotiations with the King. Encouraged by the open conflict between the Parliament and the Army, the King resolved to undertake a new Royalist movement. He escaped from his keepers, fled to the Isle of Wight, took refuge with the Governor of Carisbrook Castle, who treated the Royal guest as a prisoner, but who did not prevent him from corresponding with the Presbyterian Chiefs for the purpose of inciting another movement, which might result in the restoration of his unlimited power. The King counted specially upon the Scots, who in their extreme Presbyterianism preferred the King to the Independents. The Presbyterians now raised the King's standard in many quarters and a Scotch Army under the command of the Duke of Hamilton advanced into England. The renewal of the war in this sudden and reckless manner made the Army and its Chiefs, Fairfax, Cromwell, and Ireton, desperate, and any future reconciliation with the King impossible. In August of 1648 it came again to decisive battle at Wigan and Warrington, where the Royalists and Presbyterians were completely routed. The Army marched triumphantly into Edinburgh and reinstated the Duke of Argyle in control of the Kingdom, and then turned again to the South to deal with the Parliament and the King. The Council of Officers of the Army demanded electoral reform, a new Parliament, recognition of the supremacy of Parliament, change of the Executive into an elective office, and the bringing of the King to justice. Instead of yielding to these demands, the Parliament turned to the

King. The Army now flung aside all consideration either for King or Parliament. It invaded the House of Commons and drove out all the members except the Independents. It seized the person of the King and confined him at Windsor. It drove the Rump House to enact a resolution forming a Court of Commissioners for the trial of the King, and when the resolution was opposed by the few Lords remaining, it prompted the House to resolve and declare: "That the people are, under God, the original of all just power; that the Commons of England in Parliament assembled—being chosen by and representing the people—have the supreme power in this nation; and that whatsoever is enacted and declared for law by the Commons in Parliament assembled hath the force of law, and all the people of this nation are concluded thereby, although the consent and concurrence of the King or House of Peers be not had thereto."

The Commissioners appointed for the trial of the King went promptly forward with their work. In five days the process was finished and the King condemned to death for tyranny, treason, and murder. On the 30th of January, 1649, a masked executioner severed the Royal head from the body and held it up to the gaze of the gaping multitude.

The Revolution had reached its final stage. It had swept away King, Lords, Church, and Courts, and nothing now remained but an unlimited House of Commons as the sole and sovereign representative of the so-called people, with an Army to do its bidding. As yet the Revolution had done absolutely nothing in solution of the great problem of the reconciliation of Government and Liberty. The despotism of the House of Commons was now as complete as that of the King had ever been. It was not even more benevolent. Strangely enough, the only thing

which stood in the way of its practical as well as theoretical absolutism was the Army. The Council of Officers of the Army was in fact a truer representative of the nation than was the Rump Parliament. The Army and the Council of Officers were fully aware of this, and they insisted upon the dissolution of the Parliament and the election of another which would be more truly representative of the nation. The Council of Officers drafted a plan for such dissolution and new election. The Parliament took up the plan, and a bill in practical accordance with it was laid before it for discussion, but it became soon manifest that it had no intention of dissolving itself. The campaign in Ireland, the rising of the Scots in favor of the restoration of the Stuarts and the Dutch War occupied the attention of the Army for the next two years, and the Parliament still held on. By the beginning of the year 1653, the demands of the Army could be no longer unheeded or even delayed. The House agreed to dissolve in the following November, and the Council of Army Officers agreed to a reduction of the Army. Blake's Naval victory over the Dutch in February seems, however, to have given the House fresh courage. It now insisted that the members of the Rump House should all hold their seats in the new Parliament, and should be the judges both of the election and the fitness of the other members. The Council of Army Officers regarded such demands as dishonest and unendurable. On the 19th day of April, 1653, Cromwell strode into the House followed by a company of musketeers, and dissolved it by military force. There was now no Government and no Sovereign left in England except the Army with its Council of Officers. This Council of Officers were not yet ready, however, to declare the Army to be the permanent Sovereign of England, and they themselves the permanent Government. They

still preferred to regard the situation as temporary and tentative. They proceeded, therefore, to name a new Council of State consisting of eight Army Officers and four civilians. This body created a Constituent Convention of one hundred and fifty-six men out of lists nominated to it by the various independent religious communities, and this body, known derisively in English history as the Praise-God-Barebones-Parliament, undertook the work of giving England a new Constitution.

For nearly six months, from July to December, 1653, this strange body wrestled with the great problem, and then without accomplishing any result suddenly dissolved itself and delivered back to the "Lord General," that is, to Cromwell, "the powers received from him." This Convention had, however, appointed a new Council of State, and this Council drafted a plan called by them, "The Instrument of Government," and submitted it for adoption to the Council of Officers of the Army. The Council of Army Officers now felt compelled to act as a Constituent Convention and give England a new Constitution. This Instrument of Government which they now adopted provided, first, for the assembly of a new Parliament consisting only of a House of Commons of four hundred and sixty members, four hundred from England, thirty from Scotland, and thirty from Ireland, elected by male citizens of legal age, and possessing real or personal property to the value of two hundred pounds sterling, excluding only Catholics and those who had actually fought for the King's cause, and, second, for an Executive Power, entitled a Protectorate, which it conferred on Cromwell, and third, for an Executive Council, or Council of State, whose members should be originally appointed by the Protector, but no member of which could be removed by him except with

the consent of all the others. The Instrument provided for triennial Parliaments, which alone could make law or impose taxes, and limited the power of the Protector in matters of diplomacy and war, and the appointment of officers and the disposal of the military and naval forces by the advice and approval of the Council. The Government thus set up was considered as tentative, requiring a nunc-pro-tunc ratification by the Parliament to be assembled under the provisions of the Instrument. The elections to this Parliament were duly held, and it assembled in September of 1654.

There is no question that this Parliament was fairly representative of the nation, excluding only the relatively few Royalists who had served in the King's Army, on the one side, and a very few radical democrats, on the other. The distribution of the representation was also fairer than any that had gone before. The rotten boroughs and pocket boroughs, which before this had figured so largely in the Parliamentary representation, were excluded therefrom and the seats which their representatives had formerly occupied were now held by members from Counties and populous towns. And finally both Scotland and Ireland were for the first time participant in this body. Notwithstanding these facts, however, Cromwell assumed from the first an attitude toward it which was bound to result in strife. Cromwell's idea was that this Parliament should consider the constitutional questions as having been settled in the Instrument enacted by the Council of Army Officers and should proceed at once to questions of legislative detail, while the Parliament considered the Instrument as provisional only and assumed to revise this as well as legitimize it by its approval. Cromwell met this attitude by forbidding any member of the Parliament to

enter the House without giving his written promise not to attempt to alter the Government as constructed by the Instrument. No King of England had ever committed any more arbitrary act than this. One hundred of the members spurned this unheard-of demand and remained outside. The others gave the promise, but immediately proceeded to do just what Cromwell had forbidden, only in a manner which served as a sort of loop-hole of escape from downright breaking of word. Cromwell was not the man, however, to be held by forms. He looked straight into the substance of things. In January of 1655 he pronounced the dissolution of the body, without any reference to a new election or the assembly of another Parliament.

From a legal point of view Cromwell's position was now a bald usurpation and genuine tyranny. He crushed all resistance in Scotland and Ireland and also in England with an iron hand and sent the ringleaders of the same to the block. He divided the whole country into major-generalships and executed the ordinances promulgated by himself as the law of the land through the Generals appointed by himself for the purpose. When everything had been subordinated to his own unlimited will, and everything prepared to forestall all opposition, he summoned the packed Parliament of 1657, in which he controlled the majority of the members, whom he forced to give apparent legitimacy to all he had done and was doing. Although a majority of the members were his own creatures, still he allowed no member to enter the House without his written pass. It was from such a Parliament that Cromwell secured the legitimation of what he had done and the adoption of a Constitution. This Constitution contained provisions for a Parliament of two Houses, the one consisting of elected members, the

other of members to be appointed by Cromwell and his successors, and for the office of Protector or Executive. The Parliament undertook to restore the Kingship and to confer it upon Cromwell and his descendants but this plan shipwrecked upon the opposition of the Army. The Parliament thought that, as King, Cromwell would be obliged to rule less arbitrarily than as Protector. Whether Cromwell's reason for rejecting the Kingship was that he desired to preserve his unlimited power, or that he conceived the prejudices against the Kingship were too deeply rooted in the masses for its successful re-establishment, or that he himself was too sincerely Republican to listen to such a proposition, can hardly be determined now. His refusal left him in possession of a power more despotic than any English King had ever wielded, and it was only to be expected that he would quarrel with this Parliament which had come into being as his own creature. It broke out over the question of the title to be given to the members of the Upper House. Cromwell assumed to settle this question himself since they were appointed by him. He called them Lords. The Commons resented this, and Cromwell dissolved them in February of 1658. He was now, however, rapidly approaching his end. The irritation in which he constantly lived was telling upon him more and more. He suffered with continual attacks of fever and on the 3d of September, 1658, he passed from earth. So great, however, was his influence that his naming of his own weak and incompetent son Richard as his own successor was universally acquiesced in.

With his death, however, the reaction of the years between 1658 and 1688 had actually begun. By advice of his Council the new Protector summoned a Parliament under the system of election obtaining under King Charles.

The Cromwellian system of Government was immediately made a subject of bitter criticism. The Council of Army Officers answered immediately with a demand for a military man as their Commander-in-Chief, instead of the Protector, who was only a civilian. The Commons demanded their dissolution and they demanded the dissolution of the Commons. The Protector yielded to the Council of Officers, and when the Commons had been dispersed, they dispensed with the Protector and, seizing the Government temporarily, they called together the remnant of the Long Parliament, the Rump, which Cromwell had dissolved by military force in 1653. Not quite one hundred of the members got together and resumed the functions of a Parliament. This body demanded the dismissal of two of the most objectionable of the Army Officers. These immediately dispersed the Parliament and marched their forces northward to check the Scotch Army under Monk marching southward. The once invincible Army of Cromwell actually melted away before the resolute movement of the Scots and the friendly reception with which they were met at the hands of the English. Monk entered London without resistance. The members of Parliament got together again, resolved to dissolve and ordered a new election of the Commons. This new body, known in English history as the Convention, at once began preparations for the restoration of Royalty, but was anticipated by General Monk and his Scots, who had already recalled the King.

Making his own declaration of principles, Charles II proceeded from the Netherlands to England and landed amid universal acclaim at Dover almost at the moment when the Convention was voting: "That according to the ancient and fundamental laws of the Kingdom, the Govern-

ment is and ought to be, by King, Lords, and Commons." The concentration of all power without limitation in the hands of a single body, whether that body should be King, Protector, General-in-Chief, Lords or Commons, was now universally felt to be incompatible with Liberty. All were now conscious that the Revolution had failed to solve the great problem of the reconciliation of Government with Liberty, and had sacrificed Liberty to Government even more completely than the system of James I and Charles I had done. With this fruitful experience the men of England, Scotland, and Ireland must begin again the effort for the solution of the great problem.

The existing Convention set immediately about the work of establishing the new order. By an Act of Indemnity and Oblivion it barred any universal persecution for political acts. Only thirteen of Charles I's Judges were executed and only twenty persons were disqualified from holding public office. Likewise, while the Crown resumed possession of the Crown domain and the Bishops and Royalists gradually slipped back into their old estates, the titles to all property acquired by purchase, although its sale may have been occasioned by fine and sequestration, were confirmed by the Convention, and no claims for compensation for losses sustained by the former owners were allowed. Star Chamber, High Commission, monopolies and arbitrary taxation were barred from revival. The sole power of the Parliament to tax was firmly fixed. The standing Army was disbanded, the King being allowed to keep a few regiments only as his bodyguard, and being recognized as the Commander-in-Chief of the militia. A revenue of one million two hundred thousand pounds sterling was granted to the King for life, and one hundred thousand pounds more annually for his surrender of his feudal rights of wardship

and marriage. The Convention was by large majority Presbyterian, but when it dissolved on the eve of the election of 1661 the tide of the reaction was flowing high and when the House assembled it was found that the Cavaliers had the Parliament within their grip.

This body proceeded now to more reactionary measures especially on the ecclesiastical side. It admitted the Bishops to their ancient seats in the House of Lords. It ordered the burning of the Covenant. It required all its members to receive the communion at the beginning of the session. It renewed the Act of Uniformity, and it denied legality to all ecclesiastical authority not conferred by a Bishop. The Non-conformist Clergy were swept out of their position and the restored Anglican Church started forward on its course again leading to the principle of absolute submission to the Royal power.

The King himself did not at first appear to favor the Parliamentary Act of Uniformity. He caused a bill to be introduced into Parliament which allowed the King to exempt persons from the penalties of this Act, who could not conscientiously conform to it, but who lived peaceably and performed their religious devotions in their own way without scandal. It was perceived that, under this power, the King might establish toleration for Roman Catholicism again, which was in fact his secret purpose. The Non-conformists themselves would not support the proposition. On the other hand, Parliament forced the King to exile, by Royal order, the Roman Catholic Priests, and passed an act called the Conventicle Act, which forbade assemblies of more than five persons for religious worship other than the Episcopalian. This Act not only put an end to Roman Catholic worship, but with another Act requiring the expelled Non-conformist Clergy to take oath never to

attempt any alterations of the Government, either secular or ecclesiastical, it put an end also to Non-conformist worship.

It was now to be seen whether the Restoration with King, Lords, Commons, Courts, and established Church contained the forces rightly balanced to reconcile Government with Liberty. The pinch was first felt, naturally, in the enforcement of religious uniformity. Thousands of the Non-conformists, both lay and clerical, were thrown into prison solely because of their religious opinion, until soon the sympathy of the nation was roused in behalf of tolerance. The question now was what part of the governmental machinery would ally itself with the national sympathy and acquire from it the strength not only to protect individual conscience but to become itself supreme. The Parliament and the established Church stood solidly together. The individual was thrown back upon the King and the Royal Courts, and this is about the same thing as saying that the individual was thrown back upon the King alone to protect him against the religious tyranny of the established Church, since the Judges were subject to dismissal by the King at his own pleasure. This was soon to prove itself a worthless reliance. The King's insincerity in his policy of toleration became more and more apparent.

He followed secretly, but doggedly, two lines of conduct in his administration, the one looking to the restoration of Catholicism at home and the other to an alliance with Louis XIV in international politics. The two lines, however, were ever converging until they very nearly coalesced, for friendship with the absolute Grand Monarch of France meant hostility to the Protestant Powers, and therefore a subsidy from him which would enable Charles to dispense with Parliament and proceed with a freer hand in his

ecclesiastical policy. He undid the union with Scotland and Ireland in order to have a better chance for the re-establishment of Catholicism and Royal absolutism in these countries. He tricked his Ministers one after another as to his real purposes. He changed the Municipal Charters in order to pack the House of Commons with his adherents. In spite of Ministers, Parliament, and Judges he got his way about most things and that too without coming into direct conflict with the principal enactments of the Long Parliament. For eighteen years he worked on until he seemed so near upon the attainment of his plans, that he began to drop his disguise. The obtaining from Parliament of a large force and large supplies under pretext of an impending war with France and then allowing King Louis to have his own way in consideration of a subsidy paid by him left the French King with the mastery of Continental Europe and King Charles with an Army of twenty thousand men and a million pounds sterling in his treasury. When these facts began to be known, suspicion of the ultimate purpose of King Charles culminated in the assertion by Oates and Bedloe, shady characters both, it is true, that there existed a plot for the restoration of Roman Catholicism in England in which the Queen herself was implicated. It is also true that King Charles himself was designated as the chief victim of the plot as he was to be murdered in order that his declared Romanist brother James might ascend the throne. It was a queer and contradictory statement, but it manifested the suspicion which universally prevailed that there was something rotten in the existing situation. King Charles's duplicity was on the point of exposure and he saved himself from this humiliation by consenting to the calling of a new Parliament and the forming of a new Ministry.

The dread of the revival of Romanism finally took the shape of a plan to exclude James from the succession. The bill engineered by the Earl of Shaftsbury passed the Commons. Shaftsbury's project contemplated the elevation of the Duke of Monmouth, the eldest of the King's natural children, to the throne, while the wiser heads were for bringing in the famous William of Orange, the husband of James's daughter Mary. On account of this division in the views of the members of the King's Council, the King was able to defeat the bill altogether in the House of Lords and hold Parliament in abeyance until his own death secured the succession to the Catholic James.

James mounted the throne in February of 1685, pledging himself to protect the National Church and preserve the laws. The Parliament which he summoned proceeded from the electorate which Charles had prepared, and was overwhelmingly Royalist. With such encouragement the new King drove recklessly onward. He increased the standing Army. He filled the offices with Roman Catholics contrary to the Test Laws of Parliament. He restored High Commission. He resumed the diplomatic affiliation with King Louis. He prosecuted, persecuted, and executed the chief opponents of his arbitrary rule, until at last the loyal Royalist Parliament itself revolted. The leaders of the Royalists or Tories, of the High Churchmen, and of the Moderates or Whigs joined in an invitation to William of Orange to come over and assume the reins of Government, restore English Liberty, and protect the Protestant religion.

In November of 1688, and with an Army of some twelve or thirteen thousand men, William landed on the south coast and entered Exeter. The nation rose to assist him and James fled the country, after having endeavored to pro-

duce a state of anarchy as his final legacy. But the Lords present in London assumed as Privy Councillors the reins of Government temporarily and yielded the same to Prince William on his arrival in the City. The Lords supporting the Revolution then assembled and with all persons having been members of the Commons, who could be brought together, and the Aldermen and Members of the Common Council of the City of London, formed a provisory Parliament, both Houses of which invited Prince William to assume the provisional Government of the country and to issue a call for the election of delegates to a constitutional Convention.

This body met in January of 1689, and with the existing House of Lords undertook to reorganize the Government, re-establish Liberty, and protect the Protestant religion. After some hesitation and debate they elected Prince William and his wife Mary, daughter of the fugitive King, joint sovereigns and vested the administration of Government in the hands of William alone. On the 13th of February, 1689, they presented to the sovereign pair the Declaration of Rights, the observance of which by them was the condition upon which the authority to govern was vested in them. First, it denied to the King the powers to dispense with the execution of the laws or demand aids and contributions or to maintain a standing Army without the consent of Parliament. Then it claimed the full freedom of discussion in both Houses against all Royal interference, as well as against interference from every other quarter. Then it asserted the right of every subject of the realm to a free choice of the representatives in the House of Commons, to freedom of petition to that body for redress of grievances, and to even-handed and complete justice from the Courts.

The newly elected Sovereigns assented to the conditions and formally accepted the Crown. The Convention Parliament changed the Declaration of Rights into a formal Constitutional Statute called the Bill of Rights, and added to it many other fundamental principles, among them the power of Parliament to depose the King, change the laws of succession to the throne and choose the King at its pleasure, and the Parliamentary rule of an annual grant of subsidies and an annual grant of the authority of the King to hold a standing Army, through the form of the annual Mutiny Act.

The Revolution of 1688 made the Parliament supreme over the Crown, as it was already supreme over the Church. The Courts, being still a branch of the Royal Administration, came now also to be subordinate to Parliament, in the sense, of course, that a Parliamentary Statute took precedence of a judicial decision, and that Parliament could by impeachment remove any Judge from office. Inasmuch as the Convention Parliament then transformed itself by a simple declaration into the ordinary Parliament, we have as the result of the Revolution of 1688, the sovereignty of the ordinary legislative body in the Government.

At first it seemed as if the new King did not understand this situation. He held the administration of law and justice in his own hands and acted through officials appointed by himself and responsible only to himself. He had taken his Ministers both from the Royalists, or Tories, as they began to be called, and from the Parliamentarians, or Whigs, as they now began to be termed, and they had no collegial organization, each Minister being as to the other the independent servant of the Crown. The first years of King William's reign were full of misunderstandings and of conflict between the Crown and the Parliament,

until at last the King, at the suggestion, it is said, of Robert Earl of Sunderland, found a modus vivendi, which manifested, however, the supremacy of the Parliament over the Crown. He began taking all of his Ministers, or heads of the administrative departments from the same party, the majority party, in the Parliament and then gave them a collegial organization, which finally made them stronger than the Crown itself. In consequence of this arrangement the factions, so to speak, in the Houses became fused into two great parties, the ruling party and the opposition, and the English system created by the Revolution of 1688 developed these principles in detail down to 1832 without any fundamental changes. From 1832 to the present the English Constitution has taken on its most modern phase and will be treated in the next chapter of this book.

Our final point of consideration in this chapter is how this new order of authority left the question of the relation of Government to Liberty. The answer is simple and brief. It sacrificed all Individual Liberty, as well as all governmental agents, to the supremacy of Parliament. The benevolence of Parliament, the law-making branch of the Government, was all the Individual could look to for the definition and defense of his Immunity against the arbitrariness of Government. He had escaped the tyranny of the King, but had fallen under that of the Parliament, which might become even more terrible than anything which had preceded it. In a word, the Revolution of 1688 had failed to solve the great question we are investigating, the reconciliation of Government with Liberty, from the constitutional and juristic standpoint, altogether, and had furnished the Liberty of the Individual only the political guarantee, which claims that the legislative branch of the Government will delimit, protect, and defend the natural

realm of Individual Immunity against governmental power. The insufficiency of such a guarantee is now revealing itself in every direction.

The Revolution on the Continent must be treated as beginning in, and proceeding from, France. We may regard the absolute Monarchy in France as having become complete as to its emancipation from all legal limitations by the act of Louis XV in arresting and exiling, on July 19, 1771, the members of the Parliament of Paris. This was the body of Jurists, which held the power of giving final legitimacy to the King's edicts by registering them as of legal force. It was understood, as the custom of the realm, that they might refuse to register a Royal edict, but that such refusal might be overcome by the King himself appearing in the Parliament, assuming its presidency and ordering registration. Such a session of the Parliament was called a "lit de Justice." It was rare that such a thing ever happened and it roused great dissatisfaction when it did. The usual order of things was that an edict of the King should be regarded as contrary to the historical Constitution of France whenever the Parliament of Paris refused its registration. When now Louis XV abolished this institution there was nothing left standing between the despotism of the Royal Government and the Liberty of any person.

Louis XV survived this deed only about three years and one of the earliest acts of his successor, Louis XVI, was to recall the exiled Jurists and re-establish the Parliament with its ancient powers and functions. It must be said, however, that the King was not probably so much moved thereto by any consideration of the Liberties of his subjects as by the purpose of checking the movements of his pro-

gressive Finance Minister, Turgot, who was proposing to tax the property of the Nobles, even almost to the point of confiscation, in order to restore to soundness the fearfully disordered finances of the Kingdom. At any rate, it was the opposition of the Parliament to the plans of Turgot, which, more than anything else, finally induced the King to dismiss him. He was followed by Necker the Geneva banker, who after five years of hesitation and makeshift was driven by the ever-increasing need and demoralization of the Royal treasury to suggest something much of the nature of what Turgot had proposed. This caused his downfall in May of 1781.

During the period of Necker's régime, the King had, from the standpoint of the preservation of his Monarchy, made the great mistake of aiding the American Colonies in their War of Independence against England. The experiences of his soldiers in America were positively demoralizing to Monarchic institutions, and the cost of the undertaking brought the treasury still nearer to complete bankruptcy. After the downfall of Necker things went rapidly from bad to worse. Six years more of extravagance and corruption followed when Calonne informed the King that the end had been reached upon the line they were following and that he desired to lay a statement of the finances before an assembly of prominent men for advice and assistance. The King called such a body together in the year 1787. In history the name given to this body of men was the Assembly of the Notables. Calonne's plan, as proposed to this body, was the subjection of the Nobles and Clergy to taxation, the abolition of the road-making duty of the peasants, the Corvees, and the collection of the revenues by the Royal officials instead of farming the same to private individuals. This was virtually coming back to the

scheme offered by Turgot thirteen years before. It was immediately recognized as such, and the poor Minister, who had for years pampered the Court and the privileged classes in order to gain a popularity with them, which would tide him over the crisis, now saw himself deserted and despised by them all and dismissed by his Royal Master.

Nevertheless, the Notables felt obliged to offer the substance of his propositions to the King, who sent them to the Parliament of Paris for registration. That body refused, declaring that the Estates General alone could levy a new tax. These were ominous words from the Parliament of Paris. For one hundred and seventy-five years, now, there had been no meeting of the Etats-Généraux, and all this time the Parliament had registered the King's edicts in regard to taxation as well as to other things, without making any such representation concerning the constitutional law of the realm. In the position which it now assumed it can hardly be regarded as having been sincere. It was more probably attempting to defend the Nobles, to which class its members chiefly belonged, from taxation by Royal edict. But it had given expression to the popular desire for a legislative body, in which some form of general representation might take the place of the Royal absolutism in enacting the statutes of the land. The demand for the assembly of the Etats-Généraux grew from day to day and developed into such a popular clamor that the King, under the advice of Necker, whom he had recalled to the head of the treasury, summoned them to meet on the 5th of May, 1789.

How the members should be chosen, whether the three orders, Clergy, Nobles, and Third Estate, should sit and vote together or apart and, if apart, what weight each

Estate should have, were difficult questions to settle, so long had there been no assembly of the Estates. Even the collective name which they should bear was disputable. The lawyers belonged for the most part to the Third Estate and argued for double representation of that Estate, for assembly in a single body of all the Estates, for vote therein by persons and not by Estates, for majority decision, and for the name National Assembly for the whole body. The Parliament of Jurists held, however, that the three Estates should sit separately and vote by Estates. There is no question that the Parliament was correct as to the precedent. The trouble was that the French people of 1789 had outgrown the precedent of 1614 and would have no more of it.

The King yielded so far to the popular view as to order the choice of as many members to represent the Third Estate as both the others. He did not, however, direct whether the three Estates should sit together or how the voting in the decision of questions should be reckoned. At the first meeting for the opening ceremonies they were brought together in one great hall, and, strangely enough, no separate hall was provided for the Third Estate for their succeeding meetings. On the day after the opening, they naturally betook themselves to the large hall again and, finding this closed, to the tennis-court and waited, their leaders said, for the members of the other Estates to come in and verify the elections. Many of the lower Clergy and a few of the Nobles did appear and threw their lot in with the Tiers Etat. This body now numbered some seven hundred of the twelve hundred called by the King to represent the whole. They assumed the name of Constituent Assembly and proceeded to the verification of the elections of the members from all the Estates. On the

23d of June the King ordered a joint session of the three Estates in the great hall and there scolded the Third Estate roundly for its presumptuous conduct, and commanded the separate meeting and voting of the Estates. But it was now too late for this. When the King retired, attended by the Nobles generally and the Prelates, the Commons remained seated, and when the Royal Master of Ceremonies directed them to withdraw, Mirabeau answered for them that they were there by the will of the people and would retire only at the point of the bayonet. The Court was intimidated by this bold stand. The Duke of Orleans with some fifty of the Nobles went over to the Third Estate and on the 27th of June, four days after the joint session, the King ordered the union of the Estates in a single body and procedure therein by vote of the majority of the members.

The body was now the Constituent Assembly, the sovereign body of the Kingdom, and it proceeded to form a Constitution for France. Behind it stood the Parisians, the new National Guard, and the organized Clubs of the Revolutionary parties, while the Royal troops were unreliable and more than half inclined to fraternize with the Revolutionists. The danger was that the radical populace of the city of Paris from its vantage-ground of nearness and compactness would overwhelm both the King and the National Constituent Assembly.

The Assembly hastened to form and adopt a Constitution. It contained first of all a Bill of Rights and Immunities of the Individual against all governmental power, but it created no means and power for protecting this realm of Liberty against governmental encroachment. In fact it abolished the ancient Judicial body, the Parliament of Paris, which might have exercised that function. In this

Constitution of 1790, the Kingship itself was not even guaranteed against the action of the Legislature. This body was made to consist of a single chamber and the Royal veto over its acts was made suspensive only. A repetition of the majority vote could overcome it.

Meanwhile things were rapidly advancing toward the catastrophe. The Nobles were leaving the country. The Parisians stormed, took and destroyed the Bastile, finding just seven common criminals in it and not one political prisoner. The women of Paris, crazed with hunger, marched to Versailles, invaded and intimidated the Assembly, and carried the Royal Family with them back to Paris and virtually imprisoned them in the Tuileries, while the peasants throughout the country pillaged and burned the castles of their Lords.

From August, 1789, to April, 1791, the King made no attempt to leave the city, and when one day in the latter part of this month, he undertook to go out to Saint-Cloud for a day's shooting, he was halted by the mob and driven back to his palace prison. From this time the thought of freeing himself by flight from the unbearable situation came uppermost in his mind. On the night of the 20th of June (1791) the Royal Family with a few attendants escaped from Paris, but were recognized and captured a few days later at Varennes within twenty-five miles of the German forces waiting to receive them. They were immediately brought back to Paris and placed under strict guard in the Tuileries, and the King was temporarily deprived of his powers and prerogatives. He turned now to Lafayette, the Commander of the National Guards, as his only hope. Lafayette held the Parisian mob in check and defended the National Constituent Assembly, which had also removed to Paris, against its onslaughts. The Assem-

bly voted an amnesty to the Varennes fugitives, restored the King to his functions, and his freedom within the city, and revised and completed the Constitution, which was accepted by the King as the Constitution of France, on the 29th of September, 1791.

The revision went no further in the solution of the great problem of the reconciliation of Government with Liberty than the original draft. It contained still the elaborate Bill of Rights and Immunities for the Individual against governmental power, but it created no means for making the same effective. The ordinary Legislature, of a single Chamber, was made the final interpreter of the Constitution in this respect as well as in all other respects. What defense that would be to Liberty was quickly seen. The members of the first Legislative Assembly were immediately chosen and met in October, 1791. It was seen at once that the new body was far more radical in its composition than the Constituent Assembly had been. In the heated atmosphere of Paris, with its mob of the Forum calling itself the people, and with the excitement inspired by the news of the approach of the foreign troops marching into France, it was inevitable that the rasher elements in this radical Assembly should gain the upper hand, and that the Parisian mob should furnish the physical power for the realization of the most extreme measures.

In June of 1792 the populace broke into the Assembly in collusion with its extreme elements, the Jacobin members, overawed it and then invaded the King's palace. The King's conciliatory attitude quieted them temporarily, but on the 10th of August the renewal of the insurrection precipitated the catastrophe. The Royal Family were arrested and incarcerated in the Temple. The legislative body disappeared and the second Constituent Assembly,

called the Convent, composed chiefly of Jacobins, that is extreme radicals, began its work. It assumed unlimited, *i. e.*, sovereign power, abolished the Kingship, proclaimed the Republic, abolished the Christian Calendar, *i. e.*, the Christian religion, and beheaded the King. It formed a new Constitution, that of 1793, but never put it into operation. Under the leadership of Danton, Robespierre, and Marat, it established and for three years practised the most terrible and revolting tyranny known to human history. It demonstrated fully what an unlimited Legislature and unrestrained democracy will do with Individual Liberty. A day without fifty heads rolling from the guillotine was regarded as a dull day by the so-called people.

Finally universal terror brought moderation. Every man feared that his own cruelty would come back to him. In a fit of moderation the Convent established the Constitution of 1795 and dissolved. This Constitution created a Legislature of two chambers and an executive board of five men. It did nothing, however, for the establishment of Individual Liberty. The Directorial system was still governmental tyranny, exercised with a little more benevolence. It was only a first step to the Consulate of Bonaparte, the Military Commander, which was realized by the victorious coup of the 18th of Brumaire, *i. e.*, November 19, 1799.

The Constitution of the Consulate, in its two forms of the Triumvirate of 1799 and the sole life Consulate of Bonaparte of 1802, conferred practically unlimited power upon Bonaparte, and did nothing for the constitutional Liberty of the Individual. In comparison with what had gone before, Bonaparte's rule was both benevolent and beneficent. He was not only successful against foreign foes, but he centralized the administration of France in

the hands of the Chief Executive and established the equality of all before the law, which meant in last analysis the equal subjection of all to the rule of the Consul, and, after 1804, to the completely sovereign rule of the Emperor.

Naturally the Imperial system did really nothing toward the solution of the great problem of the reconciliation of Government and Liberty. Every appearance of the sort was a mere veil of Imperial despotism. Nevertheless, the education received by the masses in the Army prepared them first to obey and then to govern, and in the long run restored through military discipline a self-control most valuable to civilization. Moreover, the march through Europe of the Napoleonic Armies sowed the seeds of the Revolution broadcast, so that it became, in the course of the half century following, the Continental European Revolution instead of the French Revolution simply.

The overthrow of Napoleon and the Imperial system in 1814 by the Allied Powers of the Continent and England led to several important constitutional results. The first was the restoration of the Bourbons to the throne of France in the person of Louis XVIII and the establishment by him through Royal edict of the French Constitution of 1814, a quite elaborate document containing a Bill of Rights and provisions for a bicameral Legislature, which was more a Council to the King than a real lawmaking body, the members of one Chamber of which were appointed by the King and those of the other elected under a very restricted suffrage. Still there were no means created for defending the Liberties and Immunities of the Individual against the encroachments of either the Legislature or the Executive. So far as any such means were concerned, the Kingship of Louis XVIII was as absolute as that of Louis XVI had been. Nevertheless, it was a great gain that

there was a Constitution, and that it contained a quite definite realm of Individual Liberty, even though it should remain largely unrealized in practise.

The theory of the Charte Constitutionnelle of 1814 was that it was granted by the King. Theoretically, therefore, the King was the Sovereign as well as the Executive Government in the French system of 1814. It was, therefore, within the power of the King, as Sovereign, to amend, revise, or even annul, the Constitution. The French nation, on the other hand, regarded the Charter in the light of a contract between it and the King, and looked upon its provisions as the conditions upon which it accepted him and his rule. In 1830 the King, then Charles X, attempted to suspend certain of these provisions, and the result was the July Revolution of 1830, which ended by the Legislature, provided in the Charter of 1814, assuming the sovereignty, drafting and adopting a new Constitution, and electing Louis Philippe, Duke of Orleans, King.

The Constitution of 1830 contained, likewise, a Bill of Individual Rights and Immunities, but no means of maintaining them against the power of either the Legislature or the King. The problem of the reconciliation of Government and Liberty remained, thus, still unsolved. Eighteen years more of social and national development passed without any corresponding changes in the Constitution. As I have said, this Constitution was adopted by the Legislature created by the Charte Constitutionnelle of 1814. This Legislature, acting thus as a constitutional Convention, exercised sovereign power. It was itself based upon a very narrow electorate, which, on account of the high property qualification demanded for membership in it, numbered not over three hundred thousand persons for the whole of France, about one voter to one hundred persons. After

1840 the demand for broadening the electorate somewhat and for excluding the Royal officials from seats in the Legislature became quite general, and the opposition of the King to these moderate reforms precipitated the Revolution of 1848.

This Revolution was confined almost exclusively to the City of Paris, but the King fled rather precipitately, and the Provisory Government which formed itself and assumed power and control called upon the people to elect by universal suffrage members to a Constituent Convention. This Convention framed and ordained the Constitution of 1848. This Constitution contained a Bill of Individual Rights and Immunities as well as provisions for a Government consisting of a Legislature and a President, but again no means for making these Immunities effective against Government. Louis Napoleon Bonaparte was, strangely enough, chosen President by popular vote, and immediately began the work of discrediting, browbeating, and blackguarding the Legislature, ending in his coup d'état of 1851 and in the formation of a Constitution by him vesting virtually unlimited power in the hands of the President. He submitted this Constitution to the direct vote of the people, *i. e.*, to the plebiscite, and they approved by an overwhelming vote. The following year he asked the people to make him permanent Executive, Emperor, and received again their approval with almost complete unanimity.

This instrument ignored Individual Liberty altogether. It failed, therefore, utterly to offer any solution of our problem of the reconciliation of Government with Liberty.

Finally, the overthrow of the second Napoleonic Empire in France, occasioned by the defeat of the Imperial forces in the War of 1870 with the Germans, led to the formation

and adoption of the present Constitution of the French Republic by a Constitutional Convention, the members of which were elected by universal manhood suffrage. This Constitution will be examined from our point of view in the next chapter of this work.

I have spoken of the Revolution of 1789 as the French Revolution. This is true in a narrow sense only. France was the starting-point of a Revolution which spread in all directions producing results throughout all Europe, and even farther, similar to those effected in France. Even before the triumphant march of the French Armies under the command of Bonaparte sowed the seeds of the Revolution all over the Continent, the expulsive power of its principles had made itself felt. The movements of Austria to succor the Hapsburg Queen of France and the emigrant Nobility provoked the French nation and Government to take up arms against the Germans in April of 1792, and the success of the French arms against both Austria and Prussia carried French control, and with it the ideas of the Revolution, to and across the Rhine. The Austrian Netherlands were annexed to the French Republic and the Swiss Confederation was transformed into the Helvetic Republic on the French model, while the Dutch Republic was in like manner changed into the Batavian Republic.

The leadership of the French arms having now fallen into the hands of Bonaparte the work of the political transformation of Europe was pushed rapidly forward. In Italy, after chasing out the Austrian, Spanish, and Papal Governments, he founded the Cisalpine, Ligurian, Cispadine, Tiberine, and Parthenopian Republics, covering the whole territory of the peninsula except Venice. After becoming Consul and then Emperor, Bonaparte continued his policy of exciting the people, or rather the lower orders

of the people, to revolt against their existing Governments. He proclaimed both Liberty and equality, but in practise only equality was realized, equality before the Master of the World, the Emperor. Equality before the law and Government is, however, one of the chief elements of the Civil Right, and the Napoleonic Codes are to be considered as having accomplished this whenever they were put in force.

Under the promise or pretext of liberating the vassals from their Feudal oppressors, Bonaparte invaded the Holy Roman Empire of the German Nation, piercing into its most Eastern parts, Austria and Prussia, and destroyed it, erecting in its place the Confederation of the Rhine, composed of all its parts, except Austria, Prussia, Holstein, and Pomerania, into which Confederation he introduced the principles of the new French law. On the south he invaded Spain and Portugal, setting aside the old dynasties and placing his own appointees in their stead, and through these transforming the Feudal inequalities into the dead level of subjection to the law of the Empire. As he progressed he lost sight, more and more completely, of the revolutionary idea of Liberty, and gave himself up, more and more exclusively, to realizing the principle of absolute equality under his own universal despotism, and when the nations of Europe realized that his ultimate object was World Empire, rulers and subjects allied themselves to throw off the yoke.

The restoration of the old authorities in Government and in Church did not, however, restore the old Europe. Everywhere the ideas of national sovereignty, constitutional Government and Liberty were left as the indestructible deposit of the great upheaval, and when the restored Governments began again the work of ignoring the con-

stitutional Compacts, the Revolution burst forth again, in 1820–1 in Greece, Moldavia, Southern Italy, and Spain, in 1830 in France, the Netherlands, and the Southern and middle states of the German Confederation, and in 1848 again everywhere. The transformations produced by it in France have been already recounted. Elsewhere, while, perhaps, not of so great importance as in France, they still mark the march of progress toward the nationalizing and constitutionalizing of the European states. The movements of 1820–1 in Italy and Spain were crushed by the power of Russia, Prussia, and Austria in alliance for the purpose of combating the Revolutionary ideas everywhere, but resulted in the independence of Greece. The movements of 1830, however, besides the overthrow of the Bourbon system in France, left the independent constitutional Kingdom of Belgium and the constitutionalizing of the South German states as permanent results, started anew the agitation in Spain, which led to the outbreak of 1836, the assembly of the constitutional Convention and the formation and adoption of the Constitution of 1837, Spain's first genuine Constitution given by the people to the Monarch instead of by the Monarch to the people, and gave such an impetus to the Chartist or Constitutional party in Portugal under the lead of the Count of Saldanha as to bring final success in the establishment of constitutional Government there even before the movement of 1848 set fairly in.

With the upheavals of the year 1848 all Europe west of Russia yielded to the principles of the Revolution, which I have designated as national independence, constitutional Government, and Civil Liberty.

In Italy Charles Albert, the King of Savoy, Piedmont, and Sardinia, gave his subjects a liberal Constitution and

offered himself as the leader in the development of the national state with constitutional Government for Italy. The outburst was, however, too violent for such a conservative course and democratic Republics sprang up in the middle and south of the peninsula. In the German Confederation the two great states, Austria and Prussia, were now drawn into the movement and Constitutions of Government, containing also Bills of Right, were declared in force by the Emperor Ferdinand and King Frederic William IV, and a Convention of men high in authority and popular confidence assembled in Frankfurt, drafted a Constitution for a new German Empire, and offered the Imperial Crown to the King of Prussia; and Switzerland secured its first national Constitution. In Denmark, the constitutional Convention, the first genuine constitutional Convention of Danish history, assembled in Copenhagen in the spring of 1849 and framed the instrument which, with a few amendments, is still in force, while Sweden-Norway held steadily along the course of constitutional progress entered upon by them at the close of the Revolution of 1789–1815.

The reaction of 1850–1 checked the national constitutional movement momentarily in the German Confederation and in Italy. The Constitution of the new German Empire formed at Frankfurt in 1849 never went into operation. The union of Italy under the House of Savoy was checked by the victories of Austria over the Sardinian King Charles Albert, the Revolution in Hungary was crushed by the aid of Russia, and the Spanish Court entered upon its work of restoring the ancient régime.

All Europe was now, however, so Revolutionary in spirit that the slightest spark would fire the entire social structure again. This time it came from the East. The oppression

of the Turks over the Christian inhabitants of the Osman Empire led to the declaration of a protectorate over them by Russia, which France and England resisted as opening the way for the conquest of Turkey. The Crimean War of 1853–5 followed, and, in spite of the defeat of Russia by the allies, Wallachia and Moldavia united themselves to form Roumania, and attained virtual independence of Turkey, with her Constitution of 1866, formed and adopted by a real Constituent Convention, and with a Hohenzollern Prince as her elected King; Servia was freed from its Turkish garrison, and Greece attained her Constitution of 1864, and elected a Prince of the Danish House as her King. At the same time, Victor Emmanuel, King of Sardinia, was, with the help of the Emperor Napoleon, driving the Austrians out of Italy, and Prussia was driving them out of Schleswig-Holstein, and then out of the new German Union. The results of these movements were the unity of Italy under the Constitution of the Savoy-Sardinian Monarchy, the unity of the states of the German Confederation north of the Main under the lead of Prussia, and the understanding between Austria and Hungary represented by the constitutional agreement of the year 1867.

In Spain also the Revolution burst forth afresh in the year 1867, expelling the Bourbons and creating the Constitutional Republic, which was soon modified, however, by the adoption of the Royal Executive, *i. e.*, the executive holding on the principle of hereditary succession, and the restoration of the Bourbons on the basis of the Constitution of 1876, the present Constitution of the Kingdom.

The reaction of 1850–1 was also felt in the constitutional development of Portugal, but after the death of Queen Maria da Gloria, the Crown yielded to the demands for Parliamentary Government, *i. e.*, for administration by the

Ministers selected by the Crown from the major party in the Chamber of Deputies. As under such administration the country became more democratic the Chamber of Peers was changed to a House of life Peers by appointment of the Crown, *i. e.*, appointed by the Ministers of the Crown. More out of disgust at the uselessness and extravagance of the Crown and the dissoluteness of the young King, than for any serious political reasons, the Revolution of 1910 drove the Royal House out of the Kingdom, and established the Republic with the present Constitution.

In the Franco-Prussian War of 1870, the Revolution culminated in Germany bringing all the German states North and South, except, of course, Austria, which had been driven out of the North German Union of 1866, into the new Empire resting upon a popular basis, the Constitution of 1871, the present Constitution of the great German state.

These great national movements excited the Christians of the Balkan peninsula to revolt in 1875 against Turkish rule, or misrule, and in 1878 four new states were recognized as belonging to the European concert of nations, Roumania, Servia, Bulgaria, and Montenegro, while Bosnia and Herezgovina were placed under Austrian administration and have now been incorporated into the Austro-Hungarian Empire. These new states have finally succeeded in creating for themselves constitutional Governments of a fairly liberal nature.

At last in 1905 the autocracy in Russia could no longer withstand the cry of the people for participation in the Government, and for a domain of Civil Liberty. The Czar issued his decree creating the Duma and defining its powers, and guaranteeing a considerable sphere of Individual Freedom. This constitutional edict has been

amended from time to time until we have the present Constitution of the Empire.

At the same time Norway broke from its union with Sweden and vindicated its right to independent national existence, holding on to its old Constitution changed only in respect to the establishment of its own throne and King.

The net results of the whole revolutionary movement in Europe, beginning with the dethronement of Charles I in England and closing with the establishment of the Russian Duma, have been the organization of states upon the basis of national development; the distinction between the sovereign power and the Government, and in some cases their separate organization; the creation of Legislatures representing the people on the basis of a liberal and in some cases a radical electorate; the investment of the Legislature with the full and exclusive power of making ordinary law; the more or less complete control of the administration of the Government through Ministries representing the Legislatures; and the formulation, as part of the constitutional law, of a Bill of Rights and Immunities of the Individual against the power of Government. These constituted not a single step, but many steps, of advance in solving the great problem of the reconciliation of Government and Liberty. States based upon nations meant states in which a consensus of the people concerning the fundamental principles of right and wrong, of Government and Liberty, had been more or less clearly reached, states where the sovereign power back of the Constitution had become distinguished from the powers vested by it in the Government: states, therefore, which had attained those principles of representation and limitation, which alone mark the transition from arbitrary to constitutional Government. These advances in political civiliza-

tion had also produced a fairly clear conception of the domain of Individual Liberty, both in outline and content.

The Constitutions produced by them proclaimed the exemption of a large sphere of individual activity from physical compulsion, whether the attempt to exercise it should come from another individual or an association of individuals, or from the Church, or from the Government itself, and they placed the Legislatures in the position to protect the same against the Executive, whether Prince or President, through its control over the Ministry of the one or through its power to impeach the other. But they discovered no constitutional way for protecting Individual Liberty against the possible tyranny of the Legislature. Men seemed to think, notwithstanding the experiences of the French Convent of 1793, that, as the Legislature represented the people, it would protect the Individual against oppression from any and every quarter. But this is found to be true only where the suffrage is limited to men of intelligence, character, and means, and eligibility to a seat in the legislative body is conditioned upon the same qualities. Where universal suffrage is the source of legislative mandate the legislative majority is a far more consummate despot than any King or Prince has ever shown himself to be. Against such a Legislature the Individual is in the most helpless condition possible. It has rarely any sense of justice and is almost never influenced by considerations of mercy. It readily becomes the instrument through which brute force tyrannizes over intelligence and thrift, and seeks to bring society to an artificial dead level. Until a political system shall have provided the means for protecting the Individual in his constitutional immunities against this most ruthless organ of Government, it will not have solved our great problem. It will, even, in its

transfer of the balance of governmental power from the Executive to the Legislature, have placed a more formidable obstacle in the way of its solution.

Before examining critically the present European Constitutions upon this vital point, there is one more reflection to be made regarding the course of the Revolution through the different parts of Europe, which will be helpful in many directions. Every student of history is struck with the fact that, among the more or less Latinized populations, the Revolution was far more violent, bloody, and radical in its results than among the peoples of Teutonic stock; and the explanation usually given for this very important dissimilarity is that the hold of the autocratic power was stronger among the Teutonic people. To me this is not a satisfactory explanation. The greater the repression the greater is usually the explosion. We must go far deeper to find, in my opinion, the correct explanation. Certainly, from the period of the Reformation onward, we find something in the Teutonic mind which distinguishes its methods and results very widely from those of the Romanic. That something the Continental Teutons call Vernunft—reason. Their great philosophers and publicists of the seventeenth century worked out in thought its principles of life and society, both public and private. When all the bonds of external power had been loosed and broken by resistance, revolt, and revolution, here was still a force which constituted a compelling and controlling behest. Not mere will was regarded as sovereign, but will guided by reason. So universal was this philosophical and ethical sense, that passion yielded readily to the consciousness of right. While the populace rather than the people in Latin Europe was destroying, in its thirst for blood, the old ruling classes, which contained most that there was of intelligence, char-

acter, and capacity, or putting them under its feet, the Teutonic nations, especially the Germans, were finding the way under the "rule of reason" to conserve all classes, to give to each class and each individual the due and proper place and weight in the political, civil, and social state, and to employ all the genius, talent, capacity, and energy within their bounds for the highest development of the Individual and for the general welfare of the Community. Radical theories and reckless applications of them play, therefore, a far less rôle in the course of the Revolution in the Teutonic, than in the Romanic, world. The Teutonic nations have felt their way more slowly and have followed rather the method of constant repair, of fitting the new into the old, than the method of completely demolishing the old and replacing it completely with the crude and untried new. When one compares Kant with Rousseau, the Hohenzollerns with the Napoleons, one cannot help feeling the genuine conservatism or better conservationism, if I may coin a word, of the one, and the reckless destructiveness of the other. We shall be continually conscious of this distinction when we come now to examine the provisions of the present Constitutions of the European states from the point of view of the great problem whose solution we are so anxiously seeking.

CHAPTER X

THE PRESENT CONSTITUTIONS OF THE EUROPEAN STATES

Europe has now twenty-five states excluding Turkey. Of these, five are usually termed Republics, *i. e.*, states with elective Executives as well as Legislatures, viz.: Andorra, France, Portugal, San Marino, and Switzerland, and twenty which are usually termed Monarchies, *i. e.*, states having hereditary Executives, viz.: Austria, Belgium, Bulgaria, Denmark, Germany, Great Britain, Greece, Hungary, Italy, Lichtenstein, Luxemburg, Monaco, Montenegro, Netherlands, Norway, Roumania, Russia, Servia, Spain, and Sweden. Of these, two of the Republics, Andorra and San Marino, and two of the Monarchies, Lichtenstein and Monaco, are too insignificant to be considered. We will, therefore, confine our investigations to the other twenty-one.

It is not, of course, our problem, in this study to draw under consideration all of the details of these Constitutions. We are concerned only with those provisions fixing the domain of Government and that of Liberty and adjusting them to each other.

The first point of our inquiry is, therefore, whether these Constitutions or any of them rested, in the first place, upon a sovereign power, organized back of both Government and Liberty, independent of both, supreme over both, the originator of both and the determiner of their relations to each other, and whether they, in the second place, contain the continuing organization of such a power for the future adjustments of these two domains to each other.

Unless we can find this basic principle and institution in the historic development of these states and in the provisions of these Constitutions then we need go no further with our query whether they have solved the problem of the reconciliation of Government with Liberty. Without this primal authority in constitutional history and constitutional law, there can be, at best, only a truce in the conflict between Government and Liberty, but no genuine peace between them.

A cursory study of the original formation of these Constitutions reveals the fact that nine of them, viz.: those of Austria, Great Britain, Hungary, Italy, Russia, Luxemburg, Montenegro, the Netherlands, and Sweden proceeded from the existing Governments or some part thereof, the first six from the Crown and the last three from the ordinary Legislature. They lack, therefore, the primal indispensable prerequisite, the organized Sovereign back of both Government and Liberty, for the solution of our great problem. The Constitutions of the other twelve, on the other hand, viz.: those of Belgium, Bulgaria, Denmark, France, Germany, Greece, Norway, Portugal, Roumania, Servia, Spain, and Switzerland fulfil in their origin this primal condition, all having proceeded from an authority back of, and supreme over, both Government and Liberty, viz.: the nation in sovereign organization.

This almost fatal defect in the formation of the nine Constitutions first mentioned may, however, in time be cured, provided the Constitutions contain, and provide for, the organization of a continuing sovereign power, separate from, independent of, and supreme over, the ordinary Government and the Liberty of the Individual for amending and revising these instruments. On the other hand, those Constitutions which were originally created by such

a sovereign power would be hopelessly disabled from effecting the continuing adjustments between Government and Liberty necessary to the solution of our problem, from age to age, unless they contain provision for the independent sovereign organization in continuity. Let us now, therefore, proceed to the examination of all these instruments from this most fundamental point of view.

In the first place, the Constitutions of Great Britain, Hungary, Italy, and Spain provide no organization of the sovereign power independent of the Government at all. In England and Italy there exists an occasionally invoked custom of making a constitutional question the issue at an election of Legislative members. In Spain and Hungary not even this shadow of an independent sovereign power exists.

Every other state of Europe, except France and the small states, Bulgaria, Greece, and Switzerland, organizes the sovereign power within the Government or some branch thereof instead of back of the Government and in independence of it. For example, the continuing sovereignty in the Russian Constitution is the Czar, since the Legislature cannot even consider a question of constitutional law except upon his initiative, and since its action thereon is subject to his veto. Likewise in the Constitution of Montenegro. The other Constitutions with the exception of those of Bulgaria, France, Greece, and Switzerland attribute the sovereign power to their Legislatures, usually acting in some different way in the making of constitutional law from that employed in the making of ordinary law, as by the requirement of an increased majority, or of simple repetition of the vote by succeeding Legislatures, or by the same Legislature in succeeding sessions, or of a combination of both of these methods. None of

these fulfil the primal and indispensable condition for the solution of our problem.

We are, hence, limited in our inquiry to the Constitutions of Bulgaria, France, Greece, and Switzerland. The Constitution of Bulgaria organizes the continuing sovereignty of the state in a National Convention, called by the King, and acting upon propositions submitted to it by the ordinary Legislature, which shall have been voted by a two-thirds majority of its members. That of Greece does likewise as to the ratifying body, but gives the initiative to the ordinary Legislature by repetition of the passage of the proposition at separate legislative sessions. That of France organizes the personnel of the two Houses of the ordinary Legislature into a National Assembly or Convention, and then leaves this body to itself in both the initiation and adoption of constitutional measures. The ordinary Legislature or either House thereof can, however, prevent the organization of this sovereign body by simply not passing the vote which authorizes its members to participate in it. In fact the failure of one House to do this prevents also the members of the other from co-operating in the formation of the sovereign body. Finally, the Swiss Constitution provides an organization of the continuing sovereignty which is as yet the last word in the constitutional development of Continental Europe. It is the voters in National unity and Cantonal unity, so that decision is reached by a majority of the voters of the Nation, voting upon the question, provided this majority contains a majority of the voters voting on the question in a majority of the Cantons. The Swiss Constitution also provides an independent way of initiating this procedure and of initiating the proposition to be laid before the sovereign body, viz.: by the demand of fifty thousand voters to the Legis-

lature. This demand may be made in the form of a proposition fully drafted for amending the Constitution, and the Constitution orders that it be submitted by the Legislature to the Nation in sovereign organization for adoption or rejection. The Constitution provides, it is true, other ways for initiating the propositions for revision or amendment, ways through which the ordinary Legislature exercises more or less discretionary power, but inasmuch as it provides this one independent way, independent of any discretionary action by the Government, and inasmuch as it requires every proposition for constitutional change, however initiated, to be submitted to the Nation in sovereign organization back of both Government and Liberty, it may be said to have fairly provided this primal element and fundamental authority for the solution of the problem of the reconciliation of Government and Liberty.

None of the other three comes so near to a satisfactory solution of this element of our problem. The Constitutions of both Bulgaria and Greece fail to secure the independent action of the sovereign body provided by them in that they vest the initiative in the ordinary Legislature exclusively, and the Constitution of France, while avoiding this defect, allows each Chamber to prevent the assembly and organization of the sovereign body.

The Constitution of Switzerland is, therefore, the only one among those of all the states of Europe, which furnishes us with a fair foundation and a fair start in the solution of our great problem. All the others confound the sovereign body with the Government or some part thereof in such a way as to leave no sphere for Liberty into which the Government may not, in some manner and degree, intrude.

While the existence of a sovereign body, separate from,

independent of, and absolutely controlling over, both Government and Liberty is the first condition for the solution of our problem, as already explained, still we must not imagine that this alone is sufficient. Two other things at least must be carefully considered and successfully constructed, the two main creations of sovereignty, viz.: the domain of Civil Liberty, and the structure and powers of Government in so far as they relate to the maintenance and protection of that domain.

Concerning the former, first, we may say that the Constitutions of all the European states with the exception of those of Austria, Great Britain, France, Germany, and Hungary contain a well-defined sphere of Individual Immunity against governmental power, what is generally termed the Bill of Rights. It is easy to understand why the Constitutions of Great Britain and Hungary are lacking in this respect. These states really have no Constitutions in the same sense that the others have. In them, as I have already explained, the ordinary Legislature exercises unlimited power. It exercises the sovereignty. Hence any limitations upon it in behalf of the Individual would be only self-limitation, that is, a limitation which it may remove, so far as the Constitution is concerned, at its own pleasure. Such a limitation is in law no limitation. In the British and Hungarian systems there cannot thus be such a thing as a constitutional Immunity of the Individual against governmental power. The freedom of the Individual is simply legislative permission which may be withdrawn at any moment by the ordinary Legislature through an ordinary act. It is quite true, as a matter of fact, that the Individual enjoys a large sphere of freedom in these two states, larger than in many others, but not as a matter of constitutional law.

It is also easy to understand why the Constitutions of the German Empire and of the Austrian state in the Austro-Hungarian Imperial Confederation contain only a fragmentary and incomplete provision for this general realm of Individual Immunity against the powers of Government. Both of these states have the system of Federal Government and of that kind of Federal Government which vests only enumerated powers in the central Government. In such systems it is not always considered necessary for the instrument which organizes the central Government and confers powers upon it to contain also a defined sphere of Individual Immunity against governmental power, since the Constitutions of the Commonwealths within these Unions with Federal Governments may, and generally do, contain such provisions. This is exactly the situation in regard to the Commonwealths of the German Empire, and in considerable degree in regard to the Provinces of the Austrian state. Nevertheless, it must be considered a serious defect in the national Constitutions of these two great Imperial states that they do not contain provisions constructing and expressly delimiting a sufficient and satisfactory sphere of Individual Immunity against all governmental power, central as well as local. Without this they certainly cannot be regarded as having furnished what must be termed the second indispensable element in the solution of the problem of the reconciliation of Government with Liberty, viz.: the concept and content of that realm of Liberty as a part of their national constitutional law.

It is, on the other hand, not at all easy to understand why the French state with its more perfect conception and independent organization of the sovereign power back of, and supreme over, all Government and with its centralized

system of Government should not have created, in its present national Constitution, a well-defined sphere of Individual Immunity against governmental power. It has, indeed, been said that this Constitution, formed under great stress and great pressure both from within and without, is fragmentary and incomplete. But it has been amended several times, and may be rather easily amended at any time, and it is now forty years old. One cannot help the feeling that the French statesmen are not disposed to give the Liberty of the Individual a place in their constitutional law. The French have so often had the experience of the excesses of Liberty that they seem to have become somewhat shy of laying any constitutional limitations on Government in its behalf. There must be some such reason for this great defect in the present French Constitution. The first act of the French National Constituent Assembly of 1789 was the enactment of the "Declaration of the Rights of Man," on the 26th day of August of that initial year of the constitutional development of modern France, and this great instrument contains as its sixteenth Article these momentous words: "Toute société dans laquelle la garantie des droits n'est pas assurée, ni la séparation des pouvoirs déterminée, n'a point de constitution." In plain English this means that there is no such thing as constitutional Government without a series of constitutional limitations upon its powers imposed by the sovereign Nation in behalf of Individual Liberty. According to this doctrine the present Constitution of France is no Constitution at all but simply a Charter of Government.

Let us now turn our attention to the contents of this realm of Individual Liberty, or rather of Individual Immunity against the powers of Government. It will be entirely safe to say that the provisions in all these Constitutions

touching this subject are derived more or less directly from the famous French "Declaration of the Rights of Man" passed by the National Constituent Convention of the year 1789. This Declaration covers not only the Civil Liberty of the Individual, but contains also the assertion of several fundamental political rights. For the sake of logical clearness this part of the Declaration may be omitted.

In the sphere of Individual Immunity against the power of Government, the Declaration places the rights to life, liberty, and property, or, stated on the reverse, the Immunity against the power of the Government to take the life, liberty, or property of the Individual. The French Assembly, crude as was its view, saw, however, that this initial statement needed both definition and limitation. It defined, in the further provisions of the Declaration, personal liberty to be freedom from arbitrary arrest, from arrest, detention, and prosecution except in the cases and in the manner prescribed by law, that is from arrest, detention, and prosecution at the discretion of the King or his officials. What we now call the Executive branch of the Government was then regarded and termed the Government. And when the Declaration uses the term law, it defines the same as being the expression of the *general* will, not the will of the Government. The Declaration, however, makes no distinction between constitutional law, *i. e.*, law made by the sovereign Nation, and statute law, *i. e.*, law made by the Legislature.

The Declaration defines, in the second place, the Immunity of the Individual in the security of his property against the power of Government to mean that private property could be taken from its owner only for public purposes as determined by law, and only in the manner determined by law, and only upon just compensation being

rendered to the individual owner by the Government, and that no contributions or taxes should be exacted from the Individual by the Government except such as had been authorized by law, by the general will. All this is only a verbose and rather clumsy way of saying what we now express in a single sentence, viz.: "that no person shall be deprived of life, liberty, or property without due process of law," which must not in criminal matters, at least, be retroactive. The Declaration also proclaims the Immunity of the Individual in his religious belief and worship from the power of Government, in so far as the same may not come into conflict with the public order as established and determined by law. It further proclaims the Immunity of the Individual against the power of Government in the formation and expression of his opinions limited by responsibility for the abuse of this Immunity as determined by law. Finally, it proclaims that the purpose of political association and of Government is the conservation of these Liberties of the Individual.

There is no question that the French statesmen drew most largely upon English history in their construction of this famous instrument, and it is also probable that the Constitution of the United States of America drafted two years before this "Declaration of the Rights of Man" appeared, exercised some influence upon their thought.

The existing Constitutions of the present states of Europe, except those of the five above mentioned, contain these Immunities of the Individual against governmental power and most of them have extended and elaborated the same in very considerable degree. For example, all sixteen of these Constitutions, those of Belgium, Bulgaria, Denmark, Greece, Italy, Luxemburg, Montenegro, Netherlands, Norway, Portugal, Roumania, Russia, Servia, Spain, Sweden,

and Switzerland, reserve to the Individual the right of assembly, that is, they place this very important means for the attainment of a consensus of opinion and a common purpose within the realm of Immunity from governmental interference. It is generally defined and always meant that such assembly to be within the bounds of the Immunity must be unarmed, and must take place in a hall, building, or enclosed place, and that all meetings, on the other hand, in the open are subject to police permission and control.

Since the object of such assembly is usually to air some grievance or bring some pressure upon Government, the right is usually connected with the further one of petitioning the Government for a redress of grievances. All of the sixteen Constitutions, which contain the provision for the right of assembly also contain provisions for that of petition. Some of them, as that of Italy, recognize the right of petition to each and every adult person. All of these sixteen Constitutions, except only that of Italy, contain provisions reserving the right of association for all lawful purposes to the Individual against the power of Government. Italy has suffered so much throughout her whole history from secret associations of every kind, that it can excite no wonder that her Constitution omits this right from the realm of Individual Liberty.

All sixteen of these Constitutions declare the home inviolable and immune against arbitrary invasion by the officials of Government. Searches and seizures of a domiciliary nature can be made only according to law, *i. e.*, legislative act, and the officer executing such law is forbidden to do anything not authorized and commanded by the legislative act.

The Constitutions of nine of these sixteen states, viz.:

Belgium, Bulgaria, Greece, Luxemburg, Montenegro, the Netherlands, Portugal, Roumania, and Spain, contain provisions declaring the inviolability of correspondence by mail or telegraph to be an Immunity of the Individual against governmental power. The governmental power here meant, be it always remembered, is what we in America term the Executive power of Government.

Finally, the Constitutions of two of these states, viz.: of Norway and Portugal, shield the Individual against the powers of Government to execute upon him any retroactive law. As we have already seen, the Individual is by all these sixteen Constitutions exempted from the operation of any ex-post-facto law, *i. e.*, any retroactive criminal law. These two Constitutions which carry the Immunity so far as to shield the Individual against retroactive laws of both civil and criminal nature, while appearing thus to be exceptions to the rule, stand upon a stronger ground of reason, and most of the modern states of Europe and America follow this principle as a constitutional custom.

This sphere of Immunity of the Individual against the powers of Government as contained in the most modern European Constitutions is the product of centuries of thought and of struggle. It has become fairly well defined in the provisions of constitutional law and fairly well fixed in the consciousness of the Nations. In so far as the delimitation of this sphere and the statement of its contents are concerned, we may say that the modern European states have fairly solved our problem of the reconciliation of Government with Liberty.

But the final factor in the calculation, the final element of the problem, is even more important, if possible, than either of the other two, for without satisfying it the solution of the problem fails almost as completely as though

one or both of the other two had never received any development. This final element or factor in the problem is the creation of such guarantees of this sphere of Individual Immunity against governmental power as will make it genuinely and easily effective.

We may say, at the outset, that the only guarantee furnished by the Constitution of any European state for the Immunities of the Individual against governmental power consists in the power and disposition of the Legislature, the ordinary statute-making organ of the Government. The theory of European constitutional development in the seventeenth, eighteenth, and nineteenth centuries and down to the present moment has been that despotism and arbitrary rule inhere only in the Royal administration, and that the ordinary Legislature, representing the citizens or subjects of the Government, is the proper and sufficient organ for the protection of the Immunities of the Individual against governmental power. The framers of the present European Constitutions do not seem to have suspected any danger of encroachment upon these Immunities by the Legislature itself, or at least, if they did, do not seem to have discovered any escape from it.

The first and most general means which they invented for realizing the protection of the Legislature over the Immunities of the Individual against the powers of the Government or, more exactly, as we Americans would say, against the Executive branch of the Government, were the constitutional requirements that no law binding the ordinary citizens or subjects could be passed without the consent, at least, of the Legislature, that the administration of the Government should be carried on through Ministers of the Crown or the Executive head, and that these Ministers should be individually criminally responsible for crimes

and misdemeanors and infractions of the law in office. In other words, the usual and universal remedy against governmental encroachment upon the realm of Individual Immunity in the European states is the power of impeachment of the Ministers and other officials by the Legislature or by a Court at the instigation of the Legislature. Let it be remembered that I use the term impeachment in this connection in the popular sense of trial and sentence instead of in the technical sense of American law, viz.: arraignment and prosecution. Taking the European states in alphabetical order, we find that the Constitution of Belgium provides for the trial of the Ministers and other high officials for crimes and misdemeanors in office by the Court of Cassation, the highest Court of Law, on accusation by the Chamber of Deputies; that the Constitution of Bulgaria provides for their trial for these offenses by a Court established by act of the Legislature, as the Legislature consists of a single House; that the Constitution of Denmark provides for their trial by a Royal Court composed of an equal number of members of the highest regular Court of Law, and of the Upper House of the Legislature, on accusation by the Lower House of the Legislature; that the Constitution of the German Empire makes no provision whatever for impeachment, but that the Constitution of Prussia which must be taken with that of the Empire in regard to the matter in discussion, as I have already explained, provides for the trial of the Ministers for violations of the Constitution, as well as for treason and bribery, by the Supreme Court of the state, on accusation by either Chamber of the Legislature; that the Constitution of the French Republic provides for the trial of the Ministers and of the President himself by the Senate on accusation by the Chamber of Deputies; that the Constitution of

Greece provides for the trial of the Ministers for offenses in office by a High Court, constituted for the purpose, consisting of the President of the regular Court of Cassation and twelve members of the same drawn by lot by the President of the Legislative Chamber, on accusation by the Legislative Chamber, as Greece has a unicameral Legislature; that the Constitution of Italy provides that the Ministers may be tried by the Supreme Court of the Kingdom, on accusation by the Chamber of Deputies; that the Constitution of Luxemburg provides for trial of the Ministers by a Court created by statute, on accusation by the Legislative Chamber, Luxemburg having only one Legislative Chamber; that the Constitution of Montenegro provides for the trial of the Ministers by a Court composed of the members of the Supreme Court of the Kingdom and the members of the Council of State, on accusation by the Legislative Chamber, as Montenegro has a unicameral Legislature; that the Constitution of Norway provides that the Ministers may be tried by a Court composed of the members of the Supreme Court of the Kingdom and of the Upper Chamber of the Legislature, on accusation by the Lower House of the Legislature; that the Constitution of Austro-Hungary provides for the trial of the members of the Common Ministry by a court formed by the delegations, *i. e.*, the Legislative body of the Imperial Confederation, on accusation by the Delegations, and that of Austria proper provides for the trial of the Austrian Ministers by a Court created by act of the Austrian Legislature, on accusation by the Lower House of the Legislature; that the Constitution of Portugal follows that of the French Republic in this respect, as in most of its provisions; that the Constitution of Roumania provides for the trial of the Ministers by the Supreme Court of the

Kingdom, on accusation by either Chamber of the Legislature; that the Constitution of Russia provides for the trial of the Ministers for crimes and misdemeanors in office by the regular Judicial tribunals in the ordinary manner and procedure obtaining in those tribunals; that the Constitution of Servia provides for the trial of the Ministers, charged by the Legislative Chamber with the violation of the constitutional Immunities of the Individual, by the Council of State, a body chosen partly by the King and partly by the Legislative body; that the Constitution of Sweden provides for the trial of the Ministers for crimes and misdemeanors in office by the Senate, on accusation by the lower Chamber of the Legislature; and that the Constitution of Spain provides for the trial of the Ministers by the Senate, on accusation by the Chamber of Deputies; while, finally, the Constitution of Switzerland authorizes the regular Legislative body to provide by statute for the trial of the Ministers on charges of malfeasance in office.

Of the British and Hungarian practises I have not spoken because neither has a written code of constitutional law and each has long ago laid aside the process of impeachment of the individual officer as obsolete under the real régime of Parliamentary Government. By the term Parliamentary Government is intended that form of relation between the Executive and the Legislature whereby the Ministry is solidly responsible for its official acts of every kind to the Lower House of the Legislature and in case of disagreement between itself and this House must either resign or secure a dissolution of the Chamber, followed by an appeal to the voters to elect members to the new Chamber on the issue in dispute, either wholly or in connection at least with questions which do not relegate

it to a minor place, and must then yield to the will of the new Chamber or resign. There is but one complete example of this system among the European states or among the states of the world, and that is Great Britain. France, Portugal, Spain, Italy, Greece, and Norway have made a very considerable development in this direction, while Switzerland deals with its Executive simply as an agent of the Legislature, with no will or policy of its own and no joint responsibility for any political policy, a seven-headed Executive Directory with a presiding officer, all chosen by the Legislature by formal ballot and for a definite period and individually retained in office for so long as the Legislature may choose. In all of these cases the Legislature can perfectly well prevent the Executive from violating or encroaching upon the domain of Individual Immunity against governmental power without having recourse to the process of impeachment of the Ministers or other officials. A vote indicating lack of confidence is all that is necessary to bring on a Ministerial crisis, which must always finally result in the submission of the Ministry to the will of the Legislature, the existing or the newly chosen one. I cannot regard this process, however, as so favorable to the preservation of the constitutional Immunity of the Individual as the older process of impeachment, because the bodies which usually institute and try an impeachment are not only far more intelligent than the average voter, but have also the advantage of deliberation, discussion, and comparison of views. They are able, thus, to arrive at a far more accurate interpretation of the constitutional domain of Individual Liberty and consequently to act with due consideration in restraining the exaggerations of governmental power. The voters are far more likely to veer toward despotism at one moment and toward

anarchy at another than to advance steadily and intelligently along the true line of division between the spheres of Government and of Liberty. The principle and process of impeachment as contained in very nearly all the European Constitutions may, therefore, be said to be a tolerable solution of the problem of protecting the Constitutional domain of Individual Liberty against the encroachments of the Executive branch of Government, a much better solution than that offered by the practises of genuine Parliamentary Government. In this latter system of Government the Executive and the Legislature are too closely bound together. A greater independence and even a certain jealousy must obtain between them before the Legislature can be relied on to protect Individual Liberty against the tendency of the Executive to exaggerate its powers.

The more serious question, however, in these systems of Government is the protection of the Liberty of the Individual against the encroachments of the Legislature itself. When, through the Revolutions of the seventeenth and eighteenth centuries the Legislatures were first established, they were intended more as a check upon Government in behalf of Liberty than as an active part of Government. Only gradually did they become an equal participant in Government, and then the dominant factor. So gradually and imperceptibly did this come about that it has not been generally remarked that they themselves were becoming more and more affected by the exercise of governmental power, and less and less reliable as a defense of Liberty. To-day every political scientist knows that the Legislature is a more formidable foe of Individual Liberty than the Executive.

Let us at this point, however, go back to the period of

the creation of the Legislatures and examine whether in the internal structure of the original Legislatures any safeguards were provided against Legislative despotism, and then whether such original safeguards have been in the course of time destroyed or weakened.

These safeguards are to be sought in the cameral arrangements and relations and in the character of the electorate. We may state as general propositions that the original Legislatures were bicameral; that the Chambers had equal powers, and that the electorates were limited by property qualifications. These were all principles which tended to make the Legislatures considerate and conservative of Individual Liberty, even against themselves. The bicameral Legislatures, with parity of powers in each Chamber, were far less likely to encroach upon the sphere of Individual Liberty than a unicameral Legislature, with its more concentrated power and its more speedy action; and the electorate of property-holders exercised a strong, conservative influence over its legislative representatives.

Let us now examine the present Constitutions of the European states to find whether any changes have taken place in the essential characteristics of the legislative bodies which would affect their power and disposition in the protection of the Civil Liberty of the Individual against their own arbitrary action.

In the first place, the bicameral system of the Legislature is still general in Europe except in the Balkan states, Bulgaria, Servia, and Montenegro, in Greece, and in Luxemburg, and Greece has, in addition to her single Chamber, a Council of State composed of members appointed for a term of ten years on nomination by the Ministry, whose function it is to give expert opinion upon every proposed law, which opinion touches not only the policy of the pro-

posed enactment, but also its constitutionality. The Chamber may disregard this opinion, has always the power to do so, but it certainly exercises, in most cases, a certain moral restraint upon arbitrary action. Servia has also a Council of State, some of whose members are appointed by the King, and some elected by the Legislature, but its functions relate only to a certain control over executive action and it can exercise no restraint of any kind over legislative action. In her Constitution of 1901 Servia provided herself with a bicameral Legislature, but both the King and the popular Chamber found the Senate an effective clog upon hasty movements and in the Constitution of 1903, the present instrument, it was dispensed with. Bulgaria, Montenegro, and Luxemburg make no pretense of a limitation upon the action of a single Chamber.

We may say, therefore, the bicameral Legislature is still the general principle of legislative structure in the European states and that the independent action of each Chamber constitutes a certain restraint upon rash or hasty legislative action and a certain protection of the Liberty of the Individual against unconstitutional legislative encroachment.

But the effectiveness of this restraint depends in very large degree upon the parity of powers in the two Chambers. Has this been preserved during the constitutional development of the last century? Let us see. Of course, those states having unicameral Legislatures must be left out of consideration upon this point, viz.: Bulgaria, Servia, Montenegro, Greece, and Luxemburg. Of the other sixteen only five still uphold the parity of power, both in the initiation and veto of all projects of legislation, in both Houses of the Legislature. These are Austria, Germany, Russia, Sweden, and Switzerland. Were it not for the fact

that Switzerland, the most radically democratic system among the states of the world, is found among these five, it would probably be claimed that parity of power in the Legislative Chambers is associated with strong executive power and is no guarantee of Individual Liberty. As it is, however, such a claim would be weak and worthless. We must look elsewhere for the reason, and it is not difficult to find. These are the states in which the men of intelligence, character, thrift, and wealth still occupy the stations in the political society which their services and contributions to the public warrant. These are the states in which it is generally understood that making intelligence, character, and thrift subject to ignorance, vice, and sloth is destructive to civilization and genuine progress. In these states the higher classes have retained their vigor and courage and do not allow themselves to be overborne by numbers merely. The spiritual armor which they wear gives them, when they employ it courageously, the like mastery over their fellows that the helmet and breastplate of steel gave their predecessors. It is only when they seek to escape the duty and service to the state which their qualities and possessions require that they become timid and servile. Until this occurs the equality in power of the bodies which represent them with those which represent a more numerous constituency is not seriously questioned. The history of the political power of the Nobility in the Latin states and in Great Britain will fully demonstrate the force of this view.

In the other eleven states the one inequality common to them all is that the budget must be discussed and voted first by the Lower House of the Legislature. The usual course is that the Ministry make up and present the budget and that the House accepts or rejects in toto or accepts

with modification. By the budget is meant all financial measures, the levying of taxes, the making of appropriations, and the contracting of debts. This signifies that the bulk of the taxes rests upon the constituencies of the Lower House and that they who pay most should have the first word as to the levy and appropriations, a rather impregnable principle.

From this single inequality common to the Constitutions of the eleven states a number of them have made advances, some of a slight and others of a very serious character. The Constitution of Belgium provides that bills fixing the strength of the Army must be first considered and voted in the Chamber of Deputies. Inasmuch as the Chamber of Deputies represents those who must render the largest part of the military service, this procedure certainly seems sound from this point of view. The Constitutions of the Netherlands and of Norway and the practise in the Hungarian Legislature vest the initiation of all bills or projects of law in the Lower House. Inasmuch as the members of both Houses of the Norwegian Legislature are chosen by the same constituencies, it seems simply fanciful to confine the initiation of the laws to either body exclusively, and among such conservative nations as the Dutch and the Hungarian it is difficult to find the reason for any exception to, or limitations of, the parity of power in the two Houses of the Legislature. It is not necessary to the purposes of this study that we should seek the reason for the constitutional facts. They are cited here only for the purpose of showing the drift toward unicameralism in the states of the present day. The Constitutions of Norway and Roumania and the practise in the British Parliament place the entire control of the budget as to its initiation and passage in the Lower House. In Norway this feature

of the constitutional law is of little consequence since the members of both Houses are elected as members of one general assembly and when they are all thus assembled in a single body, they divide by lot into two bodies, one-fourth forming one House and three-fourths the other, and when the two differ in opinion they reunite as one body in which the House having the larger number of members, fancifully called the Lower House, or popular House, generally carries the day; but in the English and Roumanian practise it signifies that a large body of men, paying a large part of the taxes are literally subjected to the will of a larger body, which no longer represents exclusively the taxpayers, if it ever did. Finally, the Norwegian Constitution and the recently adopted English practise provide for the complete supremacy of the Lower House in all legislation. As has been explained, this is not of much consequence in the Norwegian system, since this system is virtually unicameral under a veil of bicameralism, which is decidedly transparent. In the English system, on the other hand, it marks a distinct advance in the subjection of the aristocracy to the democracy, and the tendency of democracy to unicameralism in the Legislature.

Let us examine, thirdly, the provisions of the Constitutions of these states relative to the qualifications for holding the suffrage to see whether there may be in that any guarantee of the Immunity of the Individual against the powers of Government. As I have said, constitutional Government in Europe began with limited suffrage, but the tendency has been constantly toward broadening the same until at present the Constitutions of thirteen of the twenty-one states under consideration, viz.: Austria, Bulgaria, Denmark,[1] France, Germany, Greece, Italy, Montenegro, Norway, Portugal, Spain, Sweden, and Switzerland

[1] See note on p. 287.

provide universal male suffrage as the principle of the electorate of the Lower House of their respective Legislatures. They do not all agree in regard to the minimum voting age. In fact there is considerable diversity and it goes far enough to affect in some degree the character of the electorate. Switzerland goes to the one extreme of requiring the attainment of only the twentieth year and Denmark to the other of requiring that of the thirtieth.[1] Between the two extremes are Bulgaria, France, Greece, Montenegro, and Portugal, which require the attainment of the twenty-first year; Austria and Sweden, which require the attainment of the twenty-fourth year; Germany, Norway, and Spain, which require the attainment of the twenty-fifth year; and Italy, which requires the attainment of the thirtieth year generally, but admits all males over twenty-one years of age, who can read and write or who have discharged their duty of military service. The other eight states require, in addition to the qualifications of sex, age, and citizenship, the possession of a small property or interest therein or the payment of a small tax, so slight in amount as to debar from the exercise of the suffrage no one of any real worth. The divergencies as to the age minimum obtain, however, also among these, Hungary requiring the attainment of only the twentieth year. Great Britain and Servia of the twenty-first, Luxemburg, Netherlands, Roumania, and Russia of the twenty-fifth, while Belgium, though according one vote to all male citizens twenty-five years of age, seeks to avoid the radical result of it by giving one supplemental vote to any citizen over twenty-five years of age, who possesses real estate to the value of four hundred dollars or has an annual income from real estate or from Belgian state securities to the amount of twenty dollars, also to any citizen over thirty-five years of

[1] See note on p. 287.

age having children and paying an annual house tax of five franks, and two supplemental votes to any citizen twenty-five years of age, who bears a University degree or has filled an office or practised a profession requiring the knowledge implied by such a degree; and, finally, Norway grants the full suffrage to women who pay independently, or on property held jointly by them with a man, an annual income tax on an income amounting to something over one hundred dollars in towns and something over seventy-five dollars in the country districts.

All of the European states having bicameral Legislatures, except Norway, seek in some way or other to make the Upper Chamber a more conservative body than the Lower. As I have already said, Norway elects the members of both Houses as a single body and then separates them by lot upon their assembly. The means employed by these states for producing this more conservative Upper House are partly relative to tenure, partly to term, and partly to the qualifications of the members of this body. Scarcely in any two of these Upper Houses is the tenure of their members the same. In fact there are few of them in which the tenure of the members of the particular House is uniform. In the British House of Lords, the Austrian House of Lords, the Hungarian House of Lords, and in the Spanish Senate, the greatest variety of tenure is to be found. In the British House of Lords the number of members holding by hereditary right is larger than in any of the other Upper Houses of Europe. In a House of six hundred and thirty-six members over five hundred and fifty hold by hereditary right, if we class the immediate appointees of the King among them, as we must, since the King cannot appoint a Lord without the hereditary tenure attaching thereafter, except the four Law Lords. These latter hold

for the life of the appointee in every case. The twenty-six Ecclesiastics hold also for life only, as do the twenty-eight Lords elected by the peerage of Ireland, while the sixteen Lords elected by the peerage of Scotland hold only for the duration of the Parliament to which they are elected. Hungary follows next in the order of the strength of the hereditary element, there being two hundred and twenty-nine hereditary Lords in the House of Lords or Magnates, including the Archdukes of the Royal House two hundred and forty-four, some sixty-seven ex-officio members, the High Ecclesiastics and Judges, some sixty life Lords appointed by the Crown, and three representatives chosen by the Legislature of Croatia and the Governor of Fiume. Then follows Austria in the same order, with a House of Lords consisting of some eighty-one members holding by the hereditary tenure, including the fifteen princes of the Royal House of ninety-six members, of seventeen High Ecclesiastics ex-officio, and of some one hundred and sixty members appointed by the Crown for life. And then Spain with a Senate consisting of about fifty Grandees, who hold by hereditary right, some thirty High Ecclesiastics and High Secular Officials, about one hundred members appointed by the King for life and one hundred and eighty members elected by the Provincial and Municipal Governments, the Church, the Universities, the Academies of Letters and Sciences, and the highest taxpayers, with terms of ten years. The next class of states, from this point of view, comprehends Russia, the German Empire, and Denmark, in all of which the members of the Upper House of their respective national Legislatures are partly appointed and partly elected, the hereditary element having become entirely eliminated. In Russia the members of the Upper House are, one-half appointed by the Emperor

for life and one-half elected by the Provincial Assemblies, the Church, the Universities, the Academies of Science, the commercial and industrial exchanges, and the Nobles of Russia and Poland, and hold for nine years. All members of this Chamber must be at least forty years of age and all of them must have University degrees. The Bundesrath or Federal Council of the German Empire is composed of members appointed by the Princely Heads of the twenty-two princely States of the Union and by the Governor of the Imperial Territory of Alsace-Lorraine and elected by the Senates of the three City States of the Union, Bremen, Hamburg, and Lübeck, all with indefinite terms. And lastly the Danish Senate is composed of twelve members appointed by the King[1] and fifty-four members elected by the voters, the appointees of the King holding for life and the members elected by the voters holding for eight years. The third class of states, from the point of view of the construction of their Senates, comprehends those in which all the members are appointed by the Crown. These are Italy and Greece, if we may call the Greek Council of State an Upper Chamber. In both of these the members are appointed by the King for life terms. The Italian Constitution requires that every Senator must be at least forty years of age and selected from persons having certain high qualifications prescribed expressly in the organic law. The Princes of the Royal House of full age have also seat and voice in the Senate. The fourth and final class of European States regarded from this point of view comprehends those which provide in their respective Constitutions a Senate composed entirely of elected members, viz.: Belgium, France, Norway, the Netherlands, Portugal, Roumania, Sweden, and Switzerland. In the majority of these, viz.: France, the Netherlands, Portugal,

[1] See note on p. 287.

Sweden, and Switzerland, local Assemblies elect the Senators; in the Netherlands and Sweden the ordinary Provincial Assemblies or Councils; in Portugal the ordinary Municipal Councils; in France Senatorial Electoral Colleges composed of the Councillors of the Department, the Councillors of the Arrondissements within the Department, representatives from each Municipal Council in the Department and the members of the national Chamber of Deputies from the Department; and finally in Switzerland the Senators are elected either by the Legislatures of the several Cantons or by the voters in any Canton as the Cantonal authorities may determine. In Belgium, on the other hand, the Senators are chosen partly by the Provincial Councils and in larger part by the voters who are over thirty years of age. In Roumania they are all chosen by the voters who belong to the property class, having an annual income from realty of over one hundred and fifty dollars. Finally, in Norway the Senators are chosen by the voters who choose the members of the Lower House.

Naturally, where the Senators are elected the Constitution generally fixes the qualifications of eligibility. The Belgian Constitution requires that the Senator must in all cases be at least forty years of age and, where elected by the voters, he must also be a high taxpayer or large real-estate owner. The tax qualification is fixed at a minimum of one thousand two hundred francs direct, and the ownership qualification at a property with a minimum annual income of twelve thousand francs. The French Constitution requires that all the Senators must be at least forty years of age. The Norwegian instrument requires that the members of both Houses must have attained the thirtieth year of age. The Constitution of the Kingdom of

the Netherlands provides that all Senators must be at least thirty years of age and belong to the class of highest taxed. The Portugese law follows the French. The Roumanian Constitution requires that all Senators must have attained the fortieth year of age and be possessed of an annual income of some two thousand dollars. The Swedish instrument provides that to be eligible to the Senatorial mandate the elected must be at least thirty-five years of age and must have possessed for three years before his election real property to the assessed value of some thirteen thousand five hundred dollars or an annual income of over eight hundred dollars. Finally, the Swiss Constitution leaves the question of Senatorial eligibility to the several Cantons.

There is, lastly, one more provision to be found in almost all of these Constitutions, which was doubtless intended to be a genuine conservative principle, the provision declaring that Legislative members are not subject to instructions by their constituents. Each member is declared to be the representative of the totality of the population, not only in his particular district but in the entire country, not only of those who voted for him but also of those who voted against him, and of the respective parties to which they all belong, and finally of the unenfranchised and disenfranchised, as well as of the enfranchised. He is, therefore, expected to speak and vote according to his own judgment and in the interests of the entire country and of all of its inhabitants, instead of in the interests of his particular constituency.

Now, do any or all of these provisions concerning the structure of the modern European Legislatures contain any sufficient guarantee of the constitutional Immunity of the Individual against the encroachments of the Legis-

lature itself upon this sphere? Let us give this question a little reflection.

The bicameral system of the Legislature is a certain check upon all legislation, in the sense of course that consideration of a subject by two bodies must proceed more slowly than where it may be determined by either of them. This does not mean that the Upper House of such a Legislature is always conservative and the Lower always radical. It is possible that occasionally, at least, the opposite situation should exist. It simply means that genuine conservative action, which is also genuine progressive action, is more likely to be attained through double deliberation and procedure than through single. If such be the case, the Individual may expect somewhat more intelligent consideration than from a Legislature having only a single Chamber. He has at least a double chance to convince the Legislature that it is treading upon a domain secured to him by constitutional declaration. He has a double chance to appeal to its benevolence. This is true, of course, in full measure, only when the two Houses of the Legislature have equal power. When certain subjects, especially when vital subjects, such as the preparing and enactment of the budget, are excepted from the power of one House entirely or partly, then the Individual is deprived, wholly or partly, of the advantage which the bicameral system affords his constitutional Immunity against the power of the Legislature. In fact, in respect to such subjects the bicameral system is displaced, in greater or less degree, by the unicameral system. And lastly, it is at least highly probable that an electorate of the legislative members and a legislative membership with qualifications somewhat farther-reaching than sex, age, and citizenship, in both cases or in one only, would af-

ford a more ample protection of the constitutional Immunity of the Individual against the power of the Legislature than what has been termed manhood qualifications and manhood eligibility. It would depend, of course, upon what those further qualifications might be. They should be intelligence, impartial judgment, learning, broadness of view, and sound moral character and independence. Such qualifications in the electorate and in the membership of the Legislature would certainly be defensive of the realm of Liberty, on the one side, and of the domain of Government, on the other. Such an electorate and the legislative members chosen by it would understand with a fair degree of clearness the equal necessity of both Government and Liberty in the solution of the great problems of civilization and would be disposed to lift these fundamental conceptions of Political Science and Constitutional Law above all mere considerations of party politics or personal advancement.

Now, finally, what has been the course of development upon these subjects from the beginning of the era of constitutional Government down to the present moment? Taking first the electorate. The earlier instruments provided for an electorate of moderate size and of such qualifications as gave the suffrage generally to the men of weight and responsibility and to such only. Very soon, however, discontent among the unenfranchised and the search by the politicians for a new following set the course for the extension of the suffrage. Within certain bounds such extension of the suffrage was in most cases natural and even necessary, but it has not been kept within these bounds. An unnatural and an extreme extension of the suffrage has occurred in most of the European states, chiefly owing to the intrigues and ambitions of the poli-

ticians either to increase an old following or to create a new one, until now the legislative constituencies are generally dominated by those who have the lesser stake in the welfare of the state, and who have manifested everywhere the disposition to make use of the Legislature for the curtailment of the Immunity of the Individual against governmental power, under the claim that such Immunity enables the intelligent and the capable to get the advantage in the acquisition of wealth over the ignorant and the incapable, or, as some of their most fervent spokesmen would express it, "enables the strong and artful to gain the advantage over the weak and conscientious." Of course, there is a fair advantage which the intelligent and capable naturally have over the ignorant and incapable, and this advantage cannot be taken from them by Government without injury to the public welfare; and there may be an unfair advantage taken by the intelligent and capable over the ignorant and incapable, and this unfair advantage generally consists also in the use by them of the Government for their enrichment. But the present electorate majority in most of the European states does not rest upon these distinctions, at least not clearly. It seems to be assumed that the intelligent and capable are always crafty and conscienceless and that there is no natural advantage which gives them more of the goods of this world than their less intelligent and less capable fellow countrymen possess. The electorate majority in most of the European states of to-day seems to have little conception of the true province of Individual Liberty in the work of civilization, and to regard Government as the sole instrument which the state should employ in the accomplishment of its purposes. It manifests the disposition to crush the higher intelligence and the

higher capacity by robbing them through legislation of their natural rewards. It demands the forcible equality of enjoyment no matter how great may have been the differences of achievement. It is true that the electorate of the Upper Houses and the qualifications for membership therein appear to stand in the way of such a consummation. But it must be remembered that five of the twenty-one states whose Constitutions we are considering have done away with the Upper House altogether, and that eleven of the other sixteen have denied to the Upper House parity of powers in legislation with the Lower, some of them upon one or more subjects and some of them upon all subjects, so that whatever defense of Individual Liberty there might have originally been in the existence and character of the Upper House is now rapidly vanishing. The present course of development is quite clearly toward the unicameral system in the European Legislatures, however scrupulously the form of the bicameral system may be preserved—the unicameral system, too, whose members shall be chosen by an electorate in which all natural distinctions shall be ignored, in which the mere biped shall equal the sage, and who shall themselves be required to be no more. Such a Legislature will surely be no defense for Individual Liberty against its own encroachments. Such a Legislature will always seek to substitute its own unlimited rule for the constitutional system of limited Government and defined and guaranteed Civil Liberty. At its very best, a Legislature is no reliable defender of Individual Immunity against its own encroachments. At its very best, it always manifests a tendency, at least, to encroach upon Individual Immunity. By its very best I mean a Legislature whose members and whose electorate represent a society which has not yet become

divided by divergent economical interests into classes. Such a society is, in its most advanced form, agricultural, practically exclusively so. In fact, the agricultural society is the only exclusive form which can in any considerable measure satisfy the wants of society. A Legislature consisting of small farmers elected by small farmers is the most favorable Legislature to the preservation of the freedom of the Individual in a certain sphere against Governmental power, whether exercised by an Executive or by itself, and history shows that even such a Legislature does not always do it. Just so soon, however, as the society becomes divided into classes by the development of divergent economical interests, then the struggle begins for the capture of the powers of Government, to be exercised in the furtherance of the interests of a class. At first the more intelligent and capable generally win the day and encroach, in some degree, on the Immunities of the Individual, but finally the less intelligent and capable, which are always in numerical majority, learn the lesson, and seize the Government and then through legislation reduce all Individual Immunity against governmental power to a minimum, to say the least. In a single sentence, the unicameral Legislature with the existing electorate moves along towards the socialistic state and the socialistic state does not recognize any sphere of Individual Immunity defined and guaranteed by the Constitution against the powers of Government. I cannot, therefore, consider the present Constitutions of the European states as offering any satisfactory solution of the great problem of the reconciliation of Government with Liberty. Liberty is sacrificed to Government in them all. And the chief reason why the Legislatures have not to this time realized their absolute powers in them all is, in my opinion, the

restraining influence, in the Teutonic states, of a rational philosophy of the state and of Government and in the Latin and Slavic states of the Roman and Oriental Christian Churches. There is some influence, in this respect, of religion and Church in the Teutonic states and some influence of the rule of reason in the Latin and Slavic states. But the chief reason for the actual enjoyment of a certain sphere of Individual Immunity against the constitutional absoluteness of the Legislature is, I believe, as above stated. But all this is no solution of the great problem. It is Liberty by the benevolence of Government and not by constitutional right.

NOTE

Since these pages have been put into type Denmark, in its revised Constitution of June 5, 1915, has extended the parliamentary suffrage to women, has reduced the age qualification for voting from thirty to twenty-five, and has abolished the appointed element in the Senate, making all of the members elected by the voters.

BOOK III

THE EFFORT OF AMERICA

CHAPTER I

THE UNITED STATES OF NORTH AMERICA

Let us now turn to the Americas, the so-called countries of political promise, and see what advance they may have made in the solution of our problem. Geographically the Americas are divided into North, Central, and South America and the West Indian Archipelago; and within the same there exist twenty-one sovereign communities—states; in South America ten, viz.: Argentina, Bolivia, Brazil, Chili, Colombia, Ecuador, Paraguay, Peru, Uruguay, and Venezuela; in Central America six, viz.: Costa Rica, Guatemala, Honduras, Nicaragua, Panama, and Salvador; in the West Indian Archipelago three, viz.: Cuba, Santo Domingo, and Hayti; and in North America, two, viz.: Mexico and the United States.

Of all of these the United States of North America has taken the lead in constitutional development and has been for all the rest in greater or less degree the model. We will, therefore, turn our attention first to the great North American Union and also treat of it lastly and in conclusion, since the solution which it had given to the problem of the reconciliation between Government and Liberty has, in the last three years, been called in question again and a modification of it seems to be in danger, at least, of realization.

As has been frequently indicated in the course of this inquiry, the three fundamental factors in the solution of our problem are: first, the organization of the sovereign power, the state, back of and independent of the Government; second, the delineation by the sovereign of the realm of Individual Immunity against governmental power; and third, the construction by the sovereign of the organs and the procedure for protecting this realm of Individual Immunity against the encroachments of Government.

There is nothing more difficult in political history and political science than to trace the original organization of a sovereign power, and state correctly its continuing organization and operation. Happily, this is a much easier task in the history of the American states than in that of the European or the Asiatic. The entire process stands out with much greater clearness in the full light of modern times.

The original thirteen Colonies, the fusion of whose inhabitants formed the American nation, were all severally subject to the sovereignty of the British Crown. This position of the British Crown in relation to them must be carefully distinguished from the position of the Crown as participant, through its own appointed agents, in the Government of most of them. As sovereign power the Crown framed and conferred the Charters and Patents through which it granted the territory, created the Government, vested the Government with its powers, defined the Liberties of the Individual, and reserved the final protection of the same to the Royal Courts or the Privy Council in England. As sovereign power the Crown, furthermore, amended and revised the Charters and Patents, and sometimes vacated them entirely. The grantees regarded the Charters and Patents as contracts between

themselves and the Crown and resisted, in increasing measure, the claim on the part of the Crown of the right to modify or withdraw them, until at last the attempt by the Crown to change the Massachusetts instrument precipitated the Revolution. By precipitated I do not mean caused the Revolution, but only occasioned it. The cause of the Revolution was, as the great French statesmen Turgot and Choiseul said years before it came, the formation of the American nation. This development had been consciously progressing for ten years before 1775. According to the principles of British public law the Colonies of North America were connected with each other only through the Crown, the union was what is known in political science as a personal union. But here were a number of communities scattered for a thousand miles along the Atlantic, on the east side of the Alleghany mountain range, consisting mainly of people of English descent, speaking the English language, professing the religion of Protestant Christianity, living under the customs and regulations of the English common law, and separated from the motherland by three thousand miles of ocean, which, with the then inadequate means of navigation, made intercourse difficult, slow, and very irregular. In the hundred years between 1665 and 1765 the settlements, separated originally from each other by broad belts of forest, in which the savage and wild beast roamed, increased in population and extended the settled areas until they more nearly touched each other, which naturally produced much more active and regular trade and intercourse between the inhabitants of the several Colonies. This more active trade and intercourse produced in turn a more and more constant and regular exchange of opinion regarding all public questions, especially re-

garding the relation of the several Colonies to the motherland, and when in 1765 the British Parliament made a distinct effort to assert its sovereignty over the Colonies, putting itself in the place which the Crown had in the public opinion as well as in the public law to that time occupied, the opportunity offered itself for a well-defined general policy of resistance. From that moment forward the formation of a party of resistance, not simply to particular acts of governmental arbitrariness, but to the sovereignty of the British Parliament, began to manifest itself. What were called Committees of Correspondence appeared now in every Colony. These Committees were the nuclei of the Revolutionary party in each Colony. They were the local organization of the National patriotic party. By intercourse through these Committees a consensus of opinion was approximately reached, which furnished a basis for united popular action.

The Colonial Governments had nothing to do with this movement. They were British institutions, and in their eyes this movement for the overthrow of the sovereignty of the motherland was nothing short of treason. It was an extra-legal popular movement. It was a new nation forming itself in the womb of history and preparing to emerge into independent life. By 1774 the time had come for this new National party to give itself a National organization. The Port Bill and Regulating Act of April, 1774, enacted by the British Parliament against the Colony of Massachusetts Bay, precipitated this result. In the course of the following month, the Committee of Correspondence of the Sons of Liberty, the name of the National patriotic party in the City and Colony of New York, sent out a call to all associations of a similar nature throughout the thirteen Colonies for a general Congress or

rather Convention. The term Congress has been too much connected with Government to designate correctly the body which was thus brought together. This call was acted upon by the inhabitants in the different localities, irregularly of course, and as the custom of each prompted, and on the 5th of the following September some fifty men met in the Carpenters' Hall, in Philadelphia, and formed the first National Convention known to American history. They hardly seemed to know themselves whom or what they represented, what were their powers and functions, or what was their purpose. Patrick Henry seems to have been the one, if not the only one, who had clear conceptions on these fundamental points, and he subsequently became confused and even backsliding in regard to them. In the inspiration of the moment, he came very near to telling the body what it was. He exclaimed: "British oppression has effaced the boundaries of the several Colonies; the distinctions between Virginians, Pennsylvanians, New Yorkers, and New Englanders are no more. I am not a Virginian. I am an American."

The name given to this body in American history is the First Continental Congress, but on the day of assembly and organization it was nothing more nor other than the National Convention of the patriotic party of America. What it would become depended upon what it should later do. It presented its theory of the British Colonial system of North America. It was that the Crown was the sovereign in the system and that the Crown governed through separate bodies in the several Colonies, the chief element of which was the Legislature chosen, as to its Lower House at least, by the voters and vested with the sole power of making grants to the Crown and levying taxes and also with the power of initiating and vetoing all

projects of law. If the British Parliament could be regarded as having any relation to the Colonies at all it was only in international, purely external matters, not connected with taxation or the imposition of any burdens whatsoever.

The First Continental Congress demanded the acceptance of this view by the King and the Parliament and recommended the assembly of a second Congress in May of the following year unless the grievances should be, before then, fully met and removed. This did not happen, and, in May of 1775, there assembled again in Philadelphia a body of men of about the same number as before, chosen chiefly by conventions of the people within the several Colonies. When this body met it was again only the National Convention of a party, the patriotic party, the party which we may, a little later, term the National Revolutionary party. Whether it would become anything more or other depended also on what it should do.

Just before it met, however, the conflict of arms had begun, in an irregular manner, indeed, but it had certainly produced a change of conditions. This second Convention, known as the Second Continental Congress, immediately assumed constituent powers, that is, the powers of sovereignty. It created an Army, a Navy, a Treasury, and a Post-Office and elected a Commander-in-Chief of the forces, that is, a military Executive, and itself assumed the functions of an ordinary Legislature. Further, upon proposition that it create a uniform system of local Government to take the place of the British Colonial Governments, it authorized, under the form of suggestion, the inhabitants of the several Colonial Territories to create local governmental institutions for themselves on the basis of the broadest possible suffrage. Finally, after all this

constructive constituent work had been done, the Congress declared, in the name and by the authority of the good people of the Colonies, the United Colonies to be free and independent. National unity and National sovereignty preceded thus the Declaration of Independence and produced it. This was all in the line of a sound and true development, and had the Congress, the people, and the new States of the Union gone straight forward upon this line, the great problem of the reconciliation of Government with Liberty would have been well set upon the way of solution. But, unhappily, as it appears to the student of political history, this ideal start was checked and impeded in its earliest stages of progress, and fifteen years of experience and of suffering followed before these impediments were only partially removed, and even to-day they have not been entirely removed.

The steps of this erroneous course of things can now be easily traced. The Congress appointed, upon the same date, the Committee upon Independence and that upon the Constitution. But tearing down is an easier and more rapid work than building up, and the latter Committee made its report later and the Congress, engaged in the active work of Government, of Government too under the strain and stress of war, did not take up the report for consideration until November of 1777.

During the period between July of 1776 and November of 1777, the most capable personages of the Congress withdrew from it to take part in the State Conventions for forming the new State Constitutions and Governments and then to take the posts of Governors, Judges, and legislators in the new State Governments. The prestige of the Congress sank with its capacity, as that of the States rose, and the jealousies engendered between the States

where the chief burden of the war fell and those exempt from the same, in greater or less degree, tended to breed a sense of hostility and disunion. When, then, the Congress took up the work of framing the first Constitution of the new Union, it had neither the capacity nor the disposition to combat the claims of the States to exaggerated powers in Government, even to sovereignty, and it drafted an instrument termed "Articles of Confederation," which proposed the creation of a system, the fundamental principle of which was a Confederation of sovereign States, with a central Government, consisting of a Congress of delegates chosen by the Legislatures of the several States, exercising functions in the nature of suggestion rather than powers, and these confined to a narrow list of specified subjects, without any sphere of Individual Immunity against governmental power, and of course without any means of defending such a sphere against encroachment by the Congress of the Confederation, on the one side, or the States of the Confederation, on the other.

In this new system, the first written instrument for the United States of America, there was thus not even an attempt to solve the great problem of the relation of Government to Liberty. A maimed and puerile Government and the utter ignoring of Liberty were its chief features. It was adopted by the Legislatures of all the States and went into operation in the year 1781.

In six years of contemptible existence, it demonstrated that it had not only not advanced the great problem of political civilization a single hair's breadth toward solution, but that under it local Government was fast becoming either despotic, in one case, or anarchic, in another.

A few of the greater minds saw the error of the whole situation, but were greatly puzzled how to escape from

it, because any change in the Articles of Confederation required the approval of the Legislature of every State of the Confederation. They tried first one way and then another and finally succeeded in getting a resolution through the Congress of the Confederation on the 21st of February, 1787, which read: "That in the opinion of Congress it is expedient that, on the second Monday in May next, a convention of delegates, who shall have been appointed by the several States, be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several Legislatures such alterations and provisions therein as shall, when agreed to by Congress and confirmed by the States, render the Federal Constitution adequate to the exigencies of Government and the preservation of the Union." The language here used differs a little from that employed in the paragraph of amendment of the Articles of Confederation. The existing law of amendment required the approval of the Legislature of each and every State to any change in the Articles of Confederation. This resolution speaks of approval by the States, without referring to the bodies within the States which should act or declaring specifically that all the States must approve to affect any change. Also the Congressional resolution speaks of the "Federal Constitution" instead of using the strictly legal designation of "Articles of Confederation." We do not know why these discrepancies in language were brought in or allowed to slip in. The resolution certainly does appear to give more latitude than the Articles. However that may be, the provision of the Articles was the law and any departure from it which the resolution might be conceived to allow was absolutely null and void.

In answer to this resolution the Legislatures of all

the States, except that of Rhode Island, elected delegates, and the persons chosen met in May, as required by the resolution, in Philadelphia. There is no question that they were the natural leaders, the best political minds of the country, and that they, if anybody, could handle the great problem which confronted them.

Two things they saw quite clearly from the outset. The first was that what they wanted was no amendment nor revision of the Articles of Confederation but a new instrument from start to finish, and a genuine Constitution at that. The second was that they must find some other way of putting it into force than the way prescribed in the Articles of Confederation, since this required the approval of the Legislature of every State and the attitude of the Legislature of Rhode Island to the Convention proved clearly enough that this Legislature would assent to no departures from these Articles. This was a profoundly serious thing. The method of changing the organic law provided in these Articles was the law of the land. The employment of any other method would be unlawful. It would be revolution, if successful. If not successful, it would be attentat approaching treason. The men of that Convention were large-minded enough not to be deterred by these considerations. They went straight forward, created a real Constitution of Government and Liberty and resolved that when the same should be approved by Conventions of the people in nine of the States of the Confederation it should be regarded as established over them and be put into operation.

Upon receiving notification of the adoption of the New Constitution by the Conventions of nine of the States, the Congress of the Confederation immediately framed a resolution for putting the new system into operation.

During the period between the introduction and the passage of the resolution, Conventions of the people in two more States adopted the Constitution, and it was put into operation in April of 1789, when Conventions of the people in only eleven States had ratified it. In fact the people of Rhode Island had in their town meetings rejected it.

They undoubtedly supposed and had certainly good reason to suppose that their act had defeated the new Constitution altogether and had preserved the Union under the Articles of Confederation, but when the Congress of the Confederation and the supporters of the new Constitution went resolutely forward and put the new system into operation, thereby destroying the old system of the Confederation, without any regard to the method for doing so contained in the Articles of Confederation, the only legal method, and thus left North Carolina and Rhode Island isolated and in danger of being absorbed by conquest, Conventions in both of these States quickly ratified, and by the middle of the year 1790 the Union under the new Constitution was complete.

During the period of ratification several of the Conventions had suggested an extension of the realm of Individual Immunity in the Constitution, which was immediately done in the manner prescribed in the new Constitution itself for its own amendment. With this the new instrument received its complete original form. There is thus no possible way of explaining the genesis of the new Constitution from the point of view of existing law. It was a revolutionary procedure pure and simple. It was an original sovereign act of the people of the nation organized in National and State Conventions.

Let us now examine the fundamental principles of the

new Constitution in connection with the method of its creation and see how near it came to the solution of our problem. As I have said, again and again, the first element in that solution is the existence of a sovereign power back both of Government and Liberty, which shall create, define, and correlate both and protect each against the encroachments of the other. In the original formation of the Constitution of 1787 this requirement was, as we have seen, fulfilled. It remains now to be seen whether the continuing organization of such a sovereign power is provided in the Constitution itself for future changes. Article V contains the provision which we are seeking. It authorizes four ways for amending or revising the organic law. The first is through initiation by Congress ratified by the Legislatures of three-fourths of the States of the Union; the second is through initiation by Congress ratified by Conventions of the people in three-fourths of the States; the third is through initiation by a Convention of the United States ratified by the Legislatures of three-fourths of the States; and the fourth is through initiation by a Convention of the United States ratified by Conventions of the people in three-fourths of the States of the Union. The last method is from the point of view of Political Science the ideal one. It organizes the sovereignty back of both Government and Liberty and makes it commanding over both in all respects but two. These two flaws in the principle are the necessity for the Legislatures of two-thirds of the States of the Union to join in the call for the national Convention and the exception of the provision which established the equal representation of the States in the Upper House of the national Legislature from the operation of the sovereign power as thus organized. No sovereign power is perfectly

organized until its action is freed from all obstacles by Government and until it is supreme over every subject. In the continuing organization of the sovereign power, the most fundamental principle of any Constitution, the Constitution of the United States, while far in advance of most of the organic instruments of the states of the world, is certainly surpassed by the provisions of the Swiss Constitution. Moreover, it must be remembered that in practise this more ideal method of organization has, since the original adoption of the Constitution, never been employed, but only the method first described, viz.: initiation by the national Legislature, the Congress, and ratification by the Legislatures of two-thirds of the States of the Union. While this method has the advantage of practical convenience, it hinders the solution of the great problem of the reconciliation of Government and Liberty by leaving too much to Government, since through it Government as a whole can increase its own powers. It can, therefore, make itself absolute and extinguish Liberty entirely.

The second factor, as we have so often seen, in the solution of our problem is the realm of Individual Immunity against governmental power. The original Constitution, considering the first ten amendments as contemporaneous with the same and therefore as a part of the same, contained such a realm. In outline it provided that Government should not arrest the person except by special warrant, where warrant was necessary; that Government should not detain except by judicial order, and should not demand excessive bail; that it should not prosecute for infamous crime except upon indictment by grand jury; that it should pass no sentence by a legislative act and condemn under no retroactive law; that it should

subject no person twice to jeopardy of life or limb, nor compel any person in a criminal case to give testimony against himself; that it should try no person accused of crime except by an impartial jury, publicly, after information furnished the accused of the nature and cause of the accusation, with right to be confronted by witnesses against him and to have compulsory process for securing witnesses in his favor, nor deprive any person of his life or liberty without due process of law; that Government should deprive no person of his property without due process of law, should exact no direct tax from him except under the limitation of apportionment among the States of the Union according to population, and no duty, import or excise, except under the limitation of uniformity throughout the United States, and should not take his property except for a public purpose and except under the limitations both of just compensation and of due process of law in making the condemnation and ascertaining the amount of the compensation; that Government should not deny to any person the freedom of religion nor compel him to adhere to, or contribute to the support of, any religion; that Government should not deny to any person the freedom of expressing his thoughts either verbally or through publication; and that Government should not deny to any person or persons the right to assemble peaceably and petition Government for redress of grievances; finally, that Government should not define the crime of treason, except as defined in the Constitution, viz.: as the levying of war against the United States or adhering to their enemies, giving them aid and comfort, nor convict any one for treason except on the testimony of two witnesses to the same overt act or on confession in open court, nor punish treason by corruption of blood or for-

feiture of estate except during the life of the convicted person.

This is a fairly complete domain of Individual Immunity against governmental power. The original fault with it was that, with the exception of the Immunity against the power of Government in the definition, trial, and punishment of treason, and of certain limitations upon the powers of the States in the levy of duties on exports, imports, and tonnage and in the enactment of retroactive laws, it held only against the central Government. The States of the Union might still encroach upon it.

For seventy years nothing was done to cure this fault, although it was becoming more and more manifest that in the States legalizing slaveholding the tyranny of Government was increasing and was even threatening the Liberties of the Individual in the States in which slavery was unlawful. The crisis in this development was reached in 1861 and the vindication of Liberty was, finally, constitutionally authenticated by the thirteenth and fourteenth amendments, which abolished personal slavery everywhere within the Union, made citizenship national, declared the equal protection of the laws against the powers of the States, and prohibited the States from depriving any person of life, liberty, or property without due process of law.

With this a national domain of Individual Immunity against all governmental power, central or local, of practically sufficient proportions, was constructed within the Constitution, and for nearly fifty years the country progressed under it, and men began to fancy that the solution of the great problem had been finally attained, when suddenly, almost like a bolt out of blue sky, came the upheaval of 1912, which has changed the face of things almost beyond recognition. I will reserve the discussion

of this change, however, to the concluding pages of this work, after I shall have treated of the means created by the Constitution of the United States for defending this sphere of absolute Immunity against all governmental power and shall have compared the provisions of the Constitutions of the other American states with those of the Constitution of the United States.

These means are of two general sorts. Those of the first sort are to be found in the general structure of the Government itself and those of the second in the relation of the independent Judicial power to the political departments of the Government.

The first feature in the governmental system of the United States to which I will call attention as bearing upon the problem I am handling is that it is Federal Government. It is usual to speak of the Government at Washington, the central Government, as the Federal Government. I do not use the term in that sense. By Federal Government I intend a system of Government including two or more sets of governmental organs resting upon a common sovereignty, but independent in so great a measure of each other that neither can be regarded as the agent of the other, a system in which the common sovereign distributes the powers of Government between these different sets of governmental organs on the principle that the powers in regard to national subjects shall go to the Central Government and those in regard to local subjects to the local Governments, the States of the Union.

In this distribution of governmental powers between two or more sets of governmental organs there is a certain security that the realm of Individual Immunity against governmental power will not be encroached upon. It is seldom a complete reliance and not always a partial

one. But it is easy to see that absolutism in Government can hardly perfect itself where the whole governmental power is not held by any one set of organs. Generally speaking, it is in some small degree at least a defense. This is especially true when the powers of the Central Government are expressly enumerated and the residuary powers are reserved to the local organs, the States of the Union, and when the ultimate point of residuary Government is the local Legislature. It is true that under certain conditions the local Legislature may be more tyrannic than the general. But it is not generally so. It is generally more fully controlled by considerations of Individual Liberty than the central Legislature.

The second feature of the governmental system of the United States, from the point of view of our problem, is that it is elective Government. Before the Revolutions of 1848 this would surely have been considered a defense of Individual Immunity against governmental power. But now that the old Monarchic power of the King has generally become simply the executive power in the hands of a permanent chief, this is not so apparent. In fact it is often the case that an elected body proceeds with less consideration for Individual Liberty than a King.

The third feature of the construction of the Government which must be considered from the point of view of our problem relates to the distribution of the powers of Government among several departments according to their nature, creating what is known as the check-and-balance system of Government. In this connection I will speak only of the distribution of powers between the Legislature and the Executive and the co-ordination of the Legislature and the Executive in the exercise of them. The Constitution confers upon the Legislature, the Con-

gress, the making of laws and ordinances, the levy of taxes, and the making of appropriations, and upon the Executive the Commandership of the Army and the Navy and the control of the diplomatic and civil service to the end that he may defend the country against invasion, suppress insurrection, and execute the laws. This is, broadly speaking, the line of demarcation between legislative and executive functions, and the preservation of this line has a tendency to retard the development of Government in its almost inevitable tendency to absolutism. To effect this, however, this line of demarcation must be real, not fictitious, as is the case in what is termed Parliamentary Government, as is the case, for example, in the relation of the British Parliament to the King. And that this may be so the Executive must be both responsible to the Legislature in a certain way and independent of it in another. If he should undertake to assume legislative functions, that is, if he should attempt a coup d'état, the Legislature must have the power and the process of removing him, so guarded, however, as not to be possible of employment simply to get rid of legitimate differences of opinion. And if the Legislature should undertake in its enactments to encroach upon and assume executive functions, the Executive must be furnished with the power and the means of preventing the same, not to such a degree, however, as to enable him to absolutely control legitimate legislative action. In the provisions of the Constitution for the impeachment of the President by the Lower House of Congress and his trial and condemnation by the Upper, the Senate, but only by an extraordinary majority, and, on the other hand, for the veto by the President of all ordinary acts of the legislative branch, but which can be overcome by an ex-

traordinary majority in both Houses, these relations are so arranged as to have maintained the Legislature and the Executive independent of, and yet co-ordinated with, each other. This is certainly more favorable to the preservation of limited Government than the autocracy of the President, on the one hand, or control of the administration by the Legislature, on the other.

But the chief and most effective means provided in the Constitution for the protection of the Immunity of the Individual against governmental power consists in the constitutional position and power of the Judiciary, both State and National. The clauses of the organic law relating to this subject read as follows: "The Judicial power of the United States shall be vested in one Supreme Court and in such inferior Courts as the Congress may, from time to time, ordain and establish. The Judges, both of the Supreme and inferior Courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office. The Judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority. This Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

A close reading of the debates of the Convention and of the essays of the Federalist will reveal the purposes in detail of these provisions. They were to vest the whole

Judiciary of the country, both State and National, with the power to maintain the supremacy in the order, first, of the Constitution of the United States, then of the Laws and Treaties of the United States made in pursuance of the Constitution of the United States, then of the Constitutions of the States made in pursuance of the Constitution, Laws, and Treaties of the United States, and finally, of the laws of the States made in pursuance of their Constitutions and the Constitution, Laws, and Treaties of the United States. To effect these things the Courts of the United States were vested with the power to declare the Acts of Congress, the Treaties of the United States, the Constitutions of the States of the Union, the acts of the State Legislatures and all executive acts and orders null and void whenever, in the opinion of the Court, they came into conflict with the provisions of the Constitution of the United States. They were also vested with the power of declaring the provisions of the Constitutions and the legislative or executive acts and orders of the States of the Union null and void whensoever they, in the opinion of the Court, came into conflict with a Law of Congress or a Treaty of the United States made, in the judgment of the Court, in pursuance of the Constitution of the United States. On the other hand, the Courts of the States of the Union were vested with the power of declaring the provisions of the Constitutions of the States and the acts of the State Legislatures and Executives, also the Acts of Congress and the Treaties of the United States, null and void when, in the opinion of the Court, they contravened any provision of the Constitution of the United States. But the judgments of the Courts of the States declaring an Act of Congress or a Treaty of the United States unconstitutional or the provisions of a State Con-

stitution or the acts of a State Legislature constitutional, as tested by the provisions of the Constitution of the United States, were made subject to revision, on appeal or writ of error, by the Supreme Court of the United States.

We assume that the prime object of these arrangements was the maintenance of the proper order of authority in the several parts of the whole law of the land, but it is easy to see how they protect the Immunities of the Individual against governmental power in a much more effective way than ever before conceived and realized, because these Immunities, being a part of the constitutional law of the United States, take precedence of every other branch of the law and must be so held and so upheld by the Courts, both State and National.

It would be hardly correct to say that the framers of the Constitution of 1787 invented this method and means for the protection of Liberty against Government and the reconciliation of Government with Liberty, for, besides the European examples which I have cited in the foregoing pages, they had before them several cases in the Supreme Courts of the States of the Confederation in which these Courts nullified statutes of the State Legislatures as being in conflict with the State Constitutions, and at least one case in which the Supreme Court of a State nullified an act of the State Legislature as being in conflict with the Articles of Confederation. They are, however, to be credited with having given form to the raw material, so to speak, of the scheme and with having supplemented, developed, and perfected it.

If we confine ourselves to an account of the construction of this scheme in the contemporaneous reports, we can have little doubt as to its nature and purpose. Every-

body in the Convention of 1787 realized the necessity of securing the supremacy of the Constitution of the United States over all other parts of the law of the land, and also of securing the supremacy of the Acts of the National Legislature and the Treaties of the United States over the Constitutions and legislative acts of the States of the Union. The Randolph Resolutions, the first body of propositions laid before the Convention, contained a provision for the solution of this question. It was the provision giving the Legislature of the United States a veto on the legislation of the States. This was soon seen to be defective in several respects. First, it did not cover the whole ground. It offered no way for protecting the Constitution against the Acts of the National Legislature, the Congress. Then it was offensive to all having a strong States'-rights feeling. The substitution of the judicial for the legislative method in dealing with this fundamental problem was consciously done and it filled up all the gaps in the scheme. It was one thing to have every act of a State Legislature really held up by Congress, and quite another to have it possibly questioned in a lawsuit before learned jurists and nullified entirely on legal and juristic grounds, if nullified at all, and it was soothing to State pride that the Acts of the Congress of the United States were made subject to the same principle as the acts of the State Legislatures and that the State Courts were vested with similar powers in this respect to those exercised by the Courts of the United States.

There never would have been any doubts in regard to the views and purposes of the framers of the Constitution or in regard to the meaning of the provisions of the Constitution framed by them to solve the great problem, except for the States'-rights turn which American politics

took in the period between 1794 and 1800. Every student of American history knows that the enactment by Congress of the Alien and Sedition Laws in 1798 and the prosecutions under them precipitated a struggle culminating in the attempt of two State Legislatures, those of Virginia and Kentucky, to assert for the Legislatures of the States of the Union the power of determining the constitutionality of Acts of Congress and of nullifying the same, that of Kentucky distinctly and that of Virginia rather confusedly. They appealed to the Legislatures of the other States to join them in their declaration, but not one of them did so. On the other hand, all that answered at all condemned the position taken by the two Legislatures, and five of the seven answering declared outright that it was the function of the Courts alone, and ultimately of the Supreme Court of the United States, to declare Acts of Congress unconstitutional.

Four years later the question came up judicially in the case of Marbury *vs.* Madison, and Chief Justice Marshall, in a course of reasoning which is impregnable, held that "the basis on which the whole American fabric has been erected" is "the original right of the people to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness. The exercise of this original right is a very great exertion, nor can it be, nor ought it to be, frequently repeated. The principles, therefore, so established are deemed fundamental, and, as the authority from which they proceed is supreme and can seldom act, they are designed to be permanent. This original and supreme will organizes the Government, and assigns to different departments their respective powers. It may either stop here or establish certain limits not to be transcended by those

departments. The Government of the United States is of the latter description. The powers of the Legislature are defined and limited; and, that these limits may not be mistaken or forgotten, the Constitution is written. The Constitution is either a superior permanent law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts and, like other acts, is alterable when the Legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written Constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable. Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and permanent law of the Nation, and consequently the theory of every such Government must be that an act of the Legislature repugnant to the Constitution is void. This theory is essentially attached to a written Constitution and is consequently to be considered by this Court as one of the fundamental principles of our society. If an act of the Legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the Courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would seem, at first view, an absurdity too gross to be insisted on. It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other the Courts must decide on the operation of each. . . . So if a law [an act of the Legislature] be in opposition to the Constitution; if both the act of the

Legislature and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the act of the Legislature, disregarding the Constitution, or conformably to the Constitution, disregarding the act of the Legislature, the Court must determine which of these conflicting rules governs the case. This is of the very essence of Judicial duty. If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply."

This entire argument is easily seen to be based upon the nature of a written Constitution, as the most fundamental part of the law of the land, and upon the unavoidable necessity for the Courts to apply it as paramount law in all cases coming before them. It is undoubtedly sound reasoning. But, in order that this reasoning should not be undervalued as theoretical merely, it is of importance that it should be sustained by some constitutional provision. Happily, as we have already seen, the Constitution ordains that the Judicial power of the United States shall extend to all cases in law and equity arising under the Constitution as well as under Acts of Congress and Treaties and that the Judges of the State Courts shall be bound first of all by the Constitution of the United States as the supreme law of the land, anything in the State Constitution or laws to the contrary notwithstanding. The whole of the great Chief Justice's argument is unassailable.

But in order that the position thus claimed for the Judicial power under a written Constitution should be effective, two things more must concur. The first is that the Judiciary shall be an independent department estab-

lished and sustained by the Constitution, otherwise the Legislature could avoid its restraining power by simply abolishing the Courts or limiting them by its own Statutes. This is exactly why the Imperial Courts of the German Empire cannot assert and maintain the full authority enjoyed by the Supreme Court of the United States. The other necessary thing to make the judgments of the Courts effective in decreeing the unconstitutionality of legislative acts is that the executive power must enforce the Judicial decisions. There must not be any discretion upon this point allowed the Executive. The Constitution should make it an impeachable offense for the Executive to fail to exert every element of power at his command to this end.

After the decision in Marbury *vs.* Madison the Nation appeared to recognize its principle with great unanimity as the rule of the Constitution and as the indispensable prerequisite of a Constitutional Republic. Ten years passed, when the attitude of the Commonwealths of Massachusetts, Connecticut, and Rhode Island regarding the demands made upon them by the central Government in prosecuting the War of 1812–15, seemed to threaten the supremacy of the Judiciary in constitutional interpretation, by the claim of a more ultimate power for the State Legislatures again. Happily, however, this went no further than a confused pronunciamento.

Fifteen years more rolled by without the principle of Marbury *vs.* Madison being further questioned or threatened, when the contest between the central Government and the State of Georgia involved, finally, the Judicial power. The Constitution of the United States vests Congress with the exclusive power of making rules and regulations concerning the territory belonging to the United

States and to regulate commerce with the Indian tribes. Unmindful of these provisions and disregarding the precedents, the Government of the State of Georgia, in the case of Worcester *vs.* Georgia, defied the judgment of the Supreme Court of the United States in the constitutional question and defied it successfully. The Legislature of Georgia passed an act making it a criminal offense for any one not a member of the Indian tribe or nation of the Cherokees situated within the limits of the State of Georgia to reside among them after March 31, 1831, without a license from the Governor of the State and without having taken an oath to obey and support the laws of the State. One Worcester, a missionary of the Presbyterian Church, violated this enactment, believing that the State had no jurisdiction over any person on the lands occupied by the Cherokees within the limits of the State. He was arrested by Georgia officials, tried by a Georgia Court, found guilty, condemned to imprisonment, and committed to the penitentiary of the State. His friends succeeded in procuring a writ of error from a Justice of the Supreme Court of the United States requiring the State of Georgia to show cause why the prisoner should not be liberated. This writ was served in due form on the Governor and Attorney-General of the State. Neither of these appeared before the Court or Justice, or made any answer to the writ. The clerk of the Georgia Court simply sent to the United States Court a record of the case in the Georgia Court duly authenticated. The Supreme Court of the United States determined that this was sufficient to establish the jurisdiction of the Court and took up the case. Chief Justice Marshall himself delivered the opinion; pronouncing the statute of the Legislature of the State of Georgia assert-

ing jurisdiction over persons within the lands occupied by the Cherokees to be null and void and the proceedings against Worcester to have been without warrant of law. The Georgia authorities ignored the decision and retained Worcester in prison. The President of the United States did not undertake to enforce the decision of the Court. It was common rumor that he declared he did not intend to execute it. This is the case over which the gossip went round that the President said: "John Marshall has made his decision; now let him execute it." If the President took this attitude it was most reprehensible. It was an unwarranted executive interference with the highest Judicial function. The Governor of the State somewhat later pardoned Worcester and he was discharged from prison on the Governor's pardon and not on the Court's order. The result of this controversy was a harmful strengthening of the States'-rights view of the Union now soon to be made the absorbing issue in the nullification ordinance of South Carolina.

Nearly twenty-five years more now elapsed during which period the principle laid down in Marbury *vs.* Madison was applied and accepted in every direction and the rule of the Constitution giving the Courts, especially the United States Courts, and most especially the Supreme Court of the United States, the power of nullifying all legislative as well as executive acts which were, in the opinion of the Court, trying the cases in which such acts were involved, repugnant to the Constitution, became fixed as the prime doctrine of the public law of the Republic.

This doctrine was now, however, through an indiscretion of the Chief Justice of the Supreme Court itself, participated in by the majority of the Court, destined to receive another rude shock. I refer to the famous Dred

Scott case. Assuming that every reader of this book is more or less familiar with the details of this case, I will deal with it only in outline. Sometime between 1830 and 1840 one Doctor Emerson, a resident and citizen of the State of Missouri, being an Army Surgeon, was ordered to Fort Snelling, in the Louisiana Territory north of 36° 30′, from which slavery had been abolished by the Missouri Compromise Act of Congress of the year 1820. The Doctor, nevertheless, took his slave, Dred Scott, with him as his body-servant. At Fort Snelling Dred Scott married a negro woman, the slave of an Army officer stationed there, and Doctor Emerson purchased this woman from her master and took both of these negroes back to Missouri in the year 1838. Doctor Emerson died in the year 1844, leaving the Scotts to his wife as slaves. They served Mrs. Emerson until 1853, when Dred Scott brought a suit for his freedom in a Missouri Court, on the ground that his residence in the Louisiana Territory above 36° 30′ had made him a free man. The lower court of Missouri decided in his favor. Mrs. Emerson then appealed the case to the Supreme Court of the State, which decided that, no matter what the result of residence in a free Territory might be as to a slave brought into it by his master, the law of Missouri determined the status of the negro on his return to Missouri.

Before the Supreme Court of the State had, however, reached its decision, Mrs. Emerson had transferred the Scotts to a relative, one Sandford, a citizen of New York, who hired them out in the State of Missouri, and Dred Scott had brought a suit in the Circuit Court of the United States before Judge Catron, a citizen of Tennessee, against Sandford for his liberty. The first question for the Circuit Court was, of course, whether Dred Scott could sue.

The jurisdiction of the Circuit Court rested upon that clause of the Constitution which confers the same in controversies between citizens of different States. But was Dred Scott a citizen of Missouri? Judge Catron held that as it was only alleged by Sandford that Dred Scott was a negro descended from slave parents, and that as there were such negroes who were citizens of some of the States, the presumption must be that Dred Scott could sue in his Court. However, before the case came to decision in the Circuit Court, the case of Scott *vs.* Emerson in the Supreme Court of the State was decided in the way above recited, and Justice Catron finally declared that his Court must follow the law of Missouri upon the subject as expounded by the Supreme Court of the State of Missouri, where there was no repugnance to the Constitution, laws, and treaties of the United States; and the law of Missouri was, as declared by the Missouri Supreme Court, that the condition of slavery reattached to any former slave on his return to Missouri, no matter where he had been in the meantime.

Dred Scott now carried his case by writ of error to the Supreme Court of the United States, where it was twice argued. The opinion of the Court was written by Chief Justice Taney, and was concurred in by a decided majority of his colleagues. The Chief Justice held that the writ of error brought up the entire record of the Circuit Court for examination. As we have seen, there were two main points in the decision of the Circuit Court. The first was as to the jurisdiction of the Court, which turned upon whether Dred Scott could be considered a citizen of Missouri or not, and the second was as to the effect of his return to Missouri after his sojourn in the Louisiana Territory. Chief Justice Taney held that the Circuit Court

erred in according Scott a standing in court since he was not a citizen of Missouri. The Chief Justice declared that he was not a citizen because he could not be. This was certainly enough and it would certainly have been the course of wisdom to have simply remanded the case to the Circuit Court with the order to dismiss it for want of jurisdiction. If this course had been followed there would probably have been little comment upon it. But the Chief Justice went further and reviewed the second point in the decision of the Circuit Court, viz.: that the status of slavery reattached to Scott on his return to Missouri. Here again the Chief Justice would have been wiser to have simply confirmed the judgment of the Court below, and this also would have, in all probability, caused but little comment. But he went further and took up the question whether the Louisiana Territory above 36° 31′ could be free Territory under the Constitution of the United States. This question was not decided by the Court below, was not even before the court below, and was not necessarily involved in what was decided or considered by the Court below. This part of the Chief Justice's opinion was, therefore, purely obiter dictum. He held that under the Constitution of the United States Congress could not exclude slavery from any part of the Territory of the United States.

It is not necessary for our purpose to go into the Chief Justice's argument upon this point. The thing of importance for us is the fact that this attitude of the Supreme Court of the United States brought down upon that tribunal the hostility of the new Republican party, the party, which in less than four years was to take possession of the Government. Mr. Lincoln, the man destined to occupy the Presidential chair, arraigned the Court most

severely. He regarded the dictum as a political rather than a judicial matter. The only remedies which he proposed, however, were either to induce the Court by argument to reverse its opinion, or to induce the people by argument to override it by a constitutional Amendment in the manner provided in the Constitution itself. All this was regular, proper, legitimate, and conservative, and not intended to introduce or recommend any novel method for solving constitutional questions. The controversy did, however, shake the position of the Court, and the period of confusion and War which quickly followed was not a favorable time in which to re-establish it.

As was seen in the noted Merryman case, the Court could not even protect the Individual against the exercise of extraordinary powers by the Executive, to say nothing of the Legislature. President Lincoln had Merryman arrested in the State of Maryland, a State in which no Secession ordinance had been passed, by military order, and had him incarcerated in a military prison. He suspended the writ of habeas corpus, and under this suspension held Merryman in confinement, despite the fact that the Chief Justice of the United States issued the writ in this case and, when the military officer to which it was directed declined to make any return and failed to produce the prisoner in Court, issued a writ of attachment for the body of the commanding officer holding Merryman in confinement. The Marshal of the Court was prevented from serving this latter writ by the armed sentinel at the headquarters of the military commander. The Court now acquiesced in the principle that the political departments of the Government may suspend the constitutional Immunities of the Individual against governmental power in time of war or rebellion.

At the close of the Civil War the Court began again to assert itself against any further suspensions of these Immunities. In the famous Milligan case it held that the suspension of the writ of habeas corpus did not warrant arbitrary arrest, nor trial by extraordinary tribunals, nor according to extraordinary methods, and that where the Courts were open and in the proper and unobstructed exercise of their jurisdiction, the Government could not constitutionally establish and administer martial law. The judgment of the Court was obeyed and Milligan was liberated from his peril under the military tribunal.

During the period of Reconstruction three cases came before the Court, the decisions in which served to make the position of the Court as the ultimate interpreter of the Constitution against the Congress itself a little more fixed and clear than it had ever been before.

The first of these cases was that of Mississippi *vs.* Johnson. One W. L. Sharkey, who had been provisional Governor of Mississippi by President Johnson's appointment, undertook to obtain from the Supreme Court of the United States an injunction against President Johnson, to prevent him from executing in Mississippi the Reconstruction Acts of March, 1867. The object of Ex-Governor Sharkey was to test before the Supreme Court the constitutionality of these Congressional Statutes. The Court refused the injunction on the ground that the President of the United States, while in office, is not subject to the jurisdiction of any Court save only the Senate of the United States as the Court of Impeachment.

It was thought at the time that the only reason upon which the Court declined jurisdiction was the official character of the person sought to be made defendant. The Governor of Georgia, one Jenkins, conceived that this

obstacle might be overcome by making subordinate officials to the President defendants. At his instigation the State of Georgia petitioned the Supreme Court of the United States to issue a writ of injunction against Stanton, Secretary of War, Grant, Commander-in-Chief of the Army, and Pope, the Commander of the District in which Georgia lay, forbidding them to put into execution or to cause to be put into execution the Reconstruction Acts passed by Congress in March of 1867. The Attorney-General of the United States, Mr. Stanbery, took the ground in a very masterful argument that this was a purely political question in which no Individual Immunity was primarily involved and that the Court had, therefore, no jurisdiction in the premises. It was general opinion at that time that the power of the Court to pronounce Acts of Congress null and void because of repugnance to the Constitution was without limitation as to subject, although the Court itself in the case of Luther *vs.* Borden had intimated that questions primarily political were not subject to its jurisdiction. The Court now came out squarely and declared its adherence to this principle and from that day to this the Court has strictly adhered to it. So that it may now be said that in order to move the Supreme Court of the United States, and in fact any of the Courts, to take jurisdiction where the nullification of Legislative Acts as repugnant to the Constitution is the necessary condition of the relief sought, the matter must be presented to the Court in the form of a case, that is, of a regular lawsuit, or suit in equity, in which the party asking relief shall make it appear, prima facie, that the question primarily involved is an Individual Right or Immunity against governmental power guaranteed to him by the Constitution itself. Of course, where the Individual Immunity in-

volves no political question, the matter would be clear enough. But what is a political question as distinguished from one purely of Private Right, and, in case the two are involved in the suit, which is primary and which secondary, and how far primary or how far secondary, these are all very difficult points to determine. The Constitution itself does not wholly and expressly determine them. The details, at any rate, of the determination are to be fixed either by Congress or the Judiciary. If by Congress, then the Judicial protection of the Immunities of the Individual against governmental power would be of little value. It must be, then, the Judiciary which shall finally settle these points as well as all others necessary to the defense of these Immunities.

It was much to be desired in the period of Reconstruction, *i. e.*, from 1865 to 1875, that these specific questions should have been considered and solved. Except for the trickery of the Congress of 1868 this might have been. I refer to the means employed by Congress to prevent a decision being reached in the noted McCardle case, the chief points of which were as follows: One W. H. McCardle, a newspaper editor in the State of Mississippi, was seized and confined by the military authority under which the State was governed in accordance with the Reconstruction Acts of Congress. He petitioned the Circuit Court of the United States for a writ of habeas corpus. The writ was addressed to General Gillem, military Commander of the Reconstruction District in which Mississippi lay. The General made answer to the writ, acknowledging that he had arrested McCardle and still held him in custody and pleading the Reconstruction Acts in justification. The Court expressed its satisfaction with the plea and ordered its Marshal to remand

the prisoner, who had from the time of the serving of the writ of habeas corpus been in the custody of the Marshal, to the keeping of the military authorities. McCardle's counsel then appealed the case to the Supreme Court of the United States. The Constitution vests in Congress the power to regulate the matter of appeal from the lower Courts to the Supreme Court, and Congress had by an Act passed February 5, 1867, authorized the appeal of such cases as the McCardle case from the Circuit Court to the Supreme Court; at least the Supreme Court itself interpreted the Congressional Act as authorizing the appeal in the McCardle case and entertained it by denying the motion of the counsel of the military authorities to dismiss it.

Here was now at last the jurisdiction established in a case primarily of Private Right, in a case for protecting the constitutional right of the Individual to indictment by a Grand Jury and trial by a Petit Jury in the Civil Courts of his vicinage against the power of the Government to make him subject, in time of peace, to the jurisdiction of a military tribunal. Inasmuch as the military tribunal and its processes were authorized by the Reconstruction Acts of Congress, the decision of the case must turn in the Supreme Court upon the constitutionality of these Acts. The Court evidently regarded this, however, as secondary to the protection of the Private Immunity against arbitrary power. The Congress and the leaders of the Republican party were greatly agitated over the prospect, while the President, Johnson, looked calmly on, rejoicing at the opportunity of having the constitutionality of the Reconstruction Acts finally tested. But he was destined to suffer disappointment. The Congress, being overwhelmingly Republican, speedily repealed the Appeals

Act of February 5, 1867, making the repealing Statute cover all appeals then on record as well as future attempts to appeal, and when the President vetoed the bill, Congress repassed it promptly over the veto by the necessary two-thirds majority. In this shifty way Congress not only avoided a decision by the Court on the constitutionality of the Reconstruction Acts, but also deprived American Jurisprudence of an authoritative direct interpretation of some of the important points in the relation of the constitutional Immunities of the Individual to the so-called political questions which the Court is shy of touching in defending the Individual Immunity against governmental power.

The constitutional Amendments following the Civil War increased and strengthened the Immunities of the Individual against governmental power at the same time that they increased the powers of the central Government over against those of the States. I said "the Immunities of the Individual," but I should have said "the Immunities of Persons," because Person is the word used in the Constitution and Person is, under the interpretation of the Courts, a broader term than Individual, in that Individual is synonymous with natural Person, while Person covers also artificial Persons, corporations. The three great additions to Civil Liberty made by the Thirteenth and Fourteenth Amendments, which prevent the National Government or any State of the Union from making any Person a slave and prevent any State of the Union from depriving any Person of life, liberty, or property without due process of law and from denying to any Person the equal protection of the laws, completed the realm of the Individual Immunity against governmental power, and the Judicial interpretation of these Amendments in a sense generally fa-

vorable to Liberty gave to the United States of America the most perfect system of Civil Liberty, the best protected and guaranteed against governmental power, ever attained in the civilized world.

I said "gave," not "has given," because in the last few years a very remarkable and to many a very discouraging change in popular opinion, if we can consider the actions of the politicians, the Congress, and the State Legislatures as indicative of the popular opinion, has become manifest concerning the relative spheres of Government and Liberty and has already led to a most serious modification of our constitutional law. Moreover, there does not appear at this moment any prospect of this new movement checking itself or being checked. On the other hand, the pace appears to be a continually accelerating one. It appears rather as if a new era had begun. Many say and some doubtless really think that it is an era of progress, and hail it as if the whole course of the world's history hitherto had been a failure and even a fraud. But more mature, dispassionate, and experienced thinkers view the situation and its tendencies with apprehension, not to say alarm. They see the distinctions between the Old World and the New slipping away, and that, too, not by the Old World continuing to follow in the course marked out by the New, as was the case from, let us say, the year 1848 to 1898, but by the New returning to the ideas and practises of the Old. As indicated, the change began with the Spanish-American War of 1898 and with the acquisition of territory separated geographically, and of people separated ethnically, from the territory and people of the United States. The twisting of the Constitution to meet the exigencies thus created has been followed by changes of

the Constitution internal to the Union itself of a grave character, and those already consummated threaten to lead on to many more, ending no one can tell where.

I will not, however, go into this to us all-important subject any further at this juncture, but will reserve it for fuller and more minute discussion after I shall have presented the modern solution given by the South and Central American states and Mexico to the great problem which is the theme of this work

CHAPTER II

THE PRESENT CONSTITUTIONS OF THE STATES OF SOUTH AMERICA

The independence of the states of South America and their constitutional systems sprang directly or indirectly out of the French Revolution. Originally, in so far as it is necessary to our purpose to consider them, they were Colonies of Spain and Portugal, and were the creation of a dominant race imposing itself by the power of the sword on the subject races and attaining legitimacy through the religious system of the Roman Catholic Church, the European method of state-building.

The occupation of Spain and Portugal by the armies of Napoleon in the first decade of the nineteenth century gave the necessary impulse. The great Demoralizer of Europe demoralized the sense of loyalty in the American Colonies of the European states and set them upon the road of Revolution. At first it was substantially the dominant race, the Europeans by birth or by descent, in the several Colonies who declared and won independence against the mother countries and only later and gradually have the half-breeds and pure aborigines come to exert an influence in the development of the states proceeding therefrom. That influence has not, however, produced any great changes in the original Constitutions. These documents still bear the stamp of the political philosophy of the French Revolution, viz.: national sovereignty originally organized in Convention back of the

Constitution, creating Government and delimiting a sphere of Individual Immunity against governmental power. They also manifest, in some degree, at least, the influence of the Constitution of the United States, especially in the more independent power of the Executive and in the position of the Judiciary.

The original Constitutions of all ten of the South American states were framed and adopted by National Constituent Conventions, and in this respect they fulfil the first condition for the solution of our problem of the reconciliation of Government with Liberty. But in the system and method for constitutional revision, or amendment, that is, in the organization of a continuing sovereign power independent of, separate from, and supreme over, the Government, they are not all so fortunate. Only two of them, viz.: the Argentine Union and Paraguay are so.

On proposition of the two legislative Houses, by two-thirds majority in each, a National Convention is assembled in these two states which adopts the amendment or revision. In all the rest the regular legislative branch of the Government amends or revises the Constitution. The Constitutions of Bolivia and Colombia provide for revision or amendment by a legislative Act merely with a majority of two-thirds of those voting thereon in each House, a quorum being present. That of Brazil makes the like provision with the modification that the amendment or revision must be proposed by the preceding Legislature, with a two-thirds majority in each House, or by the Legislatures of two-thirds of the States of the Brazilian Union. That of Chili makes the like provision as to the adoption of constitutional changes, with the modification that if the President agrees with the Chambers

the passage of the proposition of amendment by two Legislatures in succession does not require the extraordinary, or two-thirds, majority. The Constitutions of Ecuador and Peru require for their amendment only the passage of the proposition by two Legislatures in succession by the ordinary majority required for the enactment of Statutes. That of Uruguay requires that the proposition of amendment made by one Legislature shall be adopted by the succeeding Legislature elected upon this issue. Finally the Constitution of Venezuela provides for its amendment either by the Legislatures of a simple majority of the States, when the proposition is first made on the initiative of the Legislatures of three-fourths of the States of the Union and approved by the national Legislature, the Congress, or by the Legislatures of three-fourths of the States, when the proposition is initiated by the Congress.

In these eight states, therefore, there is no separation of the organ of sovereignty from the organs of Government. The ordinary legislative Chambers act both as sovereign and as legislative branch of the Government. The only difference lies in the method of action and in some cases in the majority necessary for action also. But this is not at all sufficient to guard the constitutional Immunities of the Individual against the encroachments of the Legislature itself. We are, therefore, compelled to say that the Constitutions of these eight states fail entirely to furnish the fundamental element for the solution of our problem, viz.: the organization of a sovereign power separate from, independent of, and commanding over all the organs of Government. In fact, there is but one real state in South America which furnishes us with this primal indispensable condition, viz.: the Argentine Union.

On the other hand, every South American state has written into its Constitution a full Bill of Rights, a well-defined and well-delimited domain of Individual Immunity from governmental power. In general it is provided therein that every man shall be the equal of every other before the law; that no man shall be arbitrarily arrested or detained; that no man shall be tried or condemned without due process of law, that the domicile is inviolable; that the right to property is inviolable and confiscation illegal; that taxation must be equally imposed, and that the taking of property by eminent domain must be for a public purpose and with due compensation; that thought and speech and conscience shall be free; that religion shall be free, but with an established Church as the recommended religion; that association for all lawful purposes shall be free; that peaceable assembly for petitioning the Government or for any other lawful purposes shall be free; and that the press shall not be subject to any censorship, but responsible through the ordinary and lawful procedure for libel of private character. Some of the Constitutions go further than this and secure to the Individual freedom of migration, immigration, and emigration and of industry and occupation.

So far, then, as the second element in the solution of the problem of the reconciliation of Government with Liberty is concerned, viz.: a well-defined and delimited realm of Individual Immunity against governmental power, we may say that the Constitutions of all the South American states fairly fulfil the requirement.

When, however, we come to the final element of the problem, we find more difficulty in reaching any satisfactory conclusions. As we have already seen, the two points to be considered in this connection are the general

structure of the Government and the position and power of the Judiciary.

First, then, as to the structure of the Government. Three of the ten South American states, viz.: Argentina, Brazil, and Venezuela, have federal systems of Government, after the model, in chief respect, of the United States of North America; that is, on the principle that the central Government is one of enumerated powers, and the States of the Union possess residuary powers, under the limitations that they may exercise no powers granted exclusively to the General Government or forbidden them in behalf of the Immunity of the Individual against governmental power. The three South American federal systems vest, however, larger powers of legislation in the Congress, the Legislature of the central Government, than does the system of the great North American Republic, in that the commercial and criminal codes are, by authority of the Constitutions of these three South American states, national Statutes. Until recently this would not have been regarded as favorable to Individual Liberty, but the most modern political thought and experience now seem to take the opposite view. The national opinion upon these subjects seems now to be regarded as favoring a larger Individual Liberty than the local opinion, and when we remember that in our own experience it was the local law which tolerated slavery and the national law which abolished it, there seems some reason for this change of opinion. However this may be, we can safely affirm that the federal system of Government is generally more favorable to Individual Liberty than the centralized system. In the distribution of governmental power between the central Government and the States of the Union in these systems, there is less danger of governmental abso-

lutism, in that the sovereign power making this distribution must be kept in more distinct and independent organization than is apt to be the case in systems of centralized Government. And it is just this independent organization of the sovereign power back of all Government, which, as we have seen, is the primal condition of a real Individual Immunity against governmental power.

In all of the South American governmental systems, whether federal or centralized, the powers of Government are distributed between the Legislature, Executive, and Judiciary, according to their nature, and a greater or less independence between the departments is constitutionally maintained. There are no Parliamentary Governments in South America. All of them are what may be termed, from this point of view, Presidential departmental Governments, the so-called check-and-balance system. Nevertheless, as we shall see in looking into these systems a little more closely, there is more tendency manifest in the direction of Parliamentarism, theoretically at least, than in the North American system.

In all of these Governments, except only those of Brazil and Uruguay, not only is mention made in the Constitution of Ministers of State and a Ministry and the method of their appointment and the necessary qualifications for appointment prescribed, but the Ministers are constitutionally allowed seat and voice, but not vote, in the legislative Chambers and are made solidly as well as separately responsible for their acts. This responsibility is in all these cases enforced by impeachment brought by the Lower House of the Legislature and decreed by the Senate, and in Ecuador and Venezuela a mere vote of censure by the Chamber of Deputies is sufficient to remove the

Ministry as a whole. This is certainly, in these two cases at least, quite an approach to Parliamentarism.

In Brazil and Uruguay, on the other hand, the check-and-balance system is preserved, theoretically at least, in full vigor. The Ministers have neither seat, voice, nor vote in the Chambers and the only method of deposing them is by individual impeachment or by a regular judicial procedure. Only these two states of South America preserve, by their constitutional law, the full benefit of the check-and-balance system in impeding Government from encroaching upon the constitutional domain of Individual Liberty. The rest provide a somewhat easier co-operation of the governmental branches and admit at least a somewhat more probable combination of them over against that domain of Individual Liberty.

Moreover, the Constitutions of all the South American states, except only that of Venezuela, vest the veto power over legislative acts in the President, or chief Executive, which may indeed be overcome by the Legislature through repetition of the passage of the Act, by two-thirds majority in the cases of Argentina, Brazil, Colombia, Chili, and Paraguay, or by simple majority only in the cases of Bolivia, Ecuador, Peru, and Uruguay. Here is again, of course, a certain possible check upon legislation hostile to Individual Liberty. It is not, however, very reliable.

So much for the relation of the organs of Government to each other in the employment of their functions. Let us now examine briefly the construction of the organs of Government and see if we find in the same any further protection, direct or indirect, for the sphere of Individual Liberty.

In all the South American states the bicameral system of the Legislature prevails, generally, and, with consid-

erable length of term. One of the ten, Peru, has a six years' term for the Deputies; five, Argentina, Bolivia, Colombia, Paraguay, and Venezuela, have a four years' term; three, Brazil, Chili, and Uruguay, have a three years' term, and one, Ecuador has a two years' term. For the members of the Senate two, Argentina and Brazil, have a nine years' term; six, Bolivia, Colombia, Chili, Paraguay, Peru, and Uruguay, have a six years' term, and two, Ecuador and Venezuela, have a four years' term. Generally, the change of members in the Deputy Chambers is total, except that in Argentina and Paraguay the change is by halves, and in Peru by thirds. On the other hand, the change in the membership of the Senate is gradual in all cases, except Ecuador and Venezuela, and this gradual change in all cases, except that of Chili, is by thirds. In Chili it is by halves. Moreover, some of these states require of the members of the Legislature or of one House thereof a property qualification. Bolivia, Chili, Peru, and Uruguay require it for the members of both Houses. Colombia requires it for the members of the Senate only.

Now, all of these constitutional requirements are usually considered as being favorable to Liberty. The probabilities are certainly on that side. From probability to certainty is, however, a step, short or long, where other conditions may bring unexpected results.

There are, on the other hand, certain other provisions prescribing the relation between the Houses in the course of legislative action which point rather in the other direction. For example, only the states of Ecuador and Peru accord equal powers of initiating and enacting legislation upon all subjects to the two Chambers. All the others vest the power of initiating revenue measures in

the House of Deputies exclusively; and the states of Argentina, Bolivia, Brazil, Chili, and Paraguay also confer upon this House alone the initiation of bills for the recruiting of the Army.

Moreover, the most of these states make Constitutional provision whereby one Chamber of the Legislature may finally overcome the opposition of the other. For example, the Argentine Constitution ordains that a bill originating in one House and changed or amended by the other, which changes or amendments are then rejected by the Chamber originating the bill, becomes law in the amended form when voted by the revising Chamber by a two-thirds majority unless rejected finally by the originating Chamber by two-thirds majority. The Brazilian Constitution makes the same provision, also that of Paraguay. The Constitution of Bolivia ordains that a bill originating in one Chamber and rejected in toto by the other becomes law when voted by the originating Chamber by a two-thirds majority unless finally rejected by the other Chamber by a two-thirds majority, and that when the two Chambers cannot separately agree upon amendments offered to the bill, they shall meet in joint assembly and arrive at a decision in this manner. The Constitution of Chili makes the same provision regarding the passage of a measure in toto as that of Bolivia and regarding the passage of an amended bill as those of Argentina, Brazil, and Paraguay. The Constitution of the state of Uruguay ordains that when the two Chambers cannot agree upon a bill originating in either, they shall meet in joint assembly and pass the bill by a two-thirds majority in the joint assembly, otherwise the bill will fail; and finally the Constitution of the state of Venezuela provides that in case of conflict between the two Chambers over a bill originating in either,

the originating Chamber may invite the other chamber to a joint sitting, but the Constitution does not compel the acceptance of the invitation. Only three of these states, viz.: Colombia, Ecuador, and Peru, do not constitutionally empower one Chamber of the Legislature to overcome the opposition of the other Chamber to a bill which it may originate. Now the states which do make such provision in their Constitutions probably facilitate thereby legislative action and this increased facility of action has, generally, a tendency to expand Government at the expense of Individual Immunity against governmental power.

Finally, the method of electing the Executive and the members of the legislative Chambers deserves little consideration from the point of view of our problem. Bolivia, Brazil, Ecuador, and Peru elect them all by direct vote of the holders of the suffrage and the suffrage is generally manhood suffrage, qualified in most cases by the ability to read and write. Argentina elects the President indirectly, the members of the Senate through the State Legislatures and the Deputies by the direct choice of the voters. Chili and Paraguay elect the President indirectly and the members of both legislative Chambers directly. Colombia elects the President and the Deputies directly and the members of the Senate indirectly. Uruguay elects the Deputies directly, the Senators indirectly, and the President by vote of the Legislature in joint session, while Venezuela elects the Deputies by the direct vote of the holders of the suffrage, the Senators by vote of the State Legislatures, and the President by vote of the two legislative Houses of the Union in joint assembly. By a cursory review of these brief statements, we may conclude that the electoral methods of Argentina, Uruguay, and Venezuela are probably more fa-

vorable to governmental conservatism and to Individual Liberty than those of the others.

We come, in conclusion, to the real test of effective protection for the Immunities of the Individual against the power of the Government, viz.: the position and power of the Judiciary. The Argentine state creates its Supreme Judicial Tribunal by the Constitution and commands through the Constitution that its members shall be appointed by the President with the approval of the Senate, shall hold their offices for life or during good behavior, shall be paid salaries fixed in the first place by Statute but undiminishable thereafter, and shall have power to determine all cases involving the constitutionality of acts of the Legislature as well as those of the Executive branch of the Government. Brazil makes the same constitutional provisions in all these respects. Likewise, Colombia, which also provides that when the President vetoes a measure sent to him from the legislative Chambers on the claim that it is unconstitutional, it must be referred to the Supreme Judicial Tribunal for its opinion, and if this Tribunal pronounces the proposed law to be in conflict with the organic law, it must be regarded as null and void. Peru makes the same constitutional provisions upon this subject as Argentina and Brazil, except that it requires the approval by both Houses of the Legislature in joint session of the nominations made by the President to the Judicial offices. Uruguay makes similar constitutional provisions upon the subject, only the choice of the Supreme Judges in the joint assembly of the two legislative Chambers is more in the nature of an election than of an approval of appointment. Venezuela must be classed with Uruguay in its constitutional arrangements concerning the Judiciary in all respects but one and that is that

this state accords only a six years' term to the Supreme Judges.

The other four States, viz.: Bolivia, Chili, Ecuador, and Paraguay, do not vest through their Constitutions the Judicial Tribunals with the power to nullify legislative acts which appear to them to conflict with the constitutional Immunities of the Individual against governmental power. All of them except Chili subordinate the Judiciary to the Legislature both as to tenure, term, and powers. Chili gives the Judges by constitutional provision the tenure of appointment by the President on nomination by the Privy Council and a life term.

If now we review briefly all the points of our statements, we must conclude that, so far as constitutional institutions and arrangements are concerned, the six South American states, viz.: Argentina, Brazil, Colombia, Peru, Uruguay, and Venezuela, have, from the point of view of our problem of the reconciliation of Government with Liberty, made some considerable advance over the European States. All of the six have made the declaration of the Individual Immunities against governmental power a part, a most important part, of their constitutional law, and have created the Judicial tribunals by Constitutional law and vested them with the power to protect the realm of Individual Immunity against encroachment by any branch or all branches of the Government. This has not been done by any European state.

Moreover, these six South American states have so fashioned their governmental machinery, especially in the relation of its branches to each other, as to avoid to a higher degree than in the European states the tendency to Autocracy on the one side or Parliamentary absolutism on the other. If they appear to lag behind the European

states in their general political civilization, it must not be attributed to the theory of their public law, but to the character of their populations. The Indian, the Negro, and the Mestizo form the greater part of them everywhere, except in the Argentine Republic. The force, therefore, to work this good machinery is what is wanting.

When we come, finally, to compare the Constitutions of these six states with each other, we find that only one of them contains all the factors for a satisfactory solution of our problem, viz.: the organized continuing sovereignty back of, separate from, and supreme over the Government, the full declaration of the constitutional Immunities of the Individual against all governmental power, the balance of the governmental machinery in so far as to prevent Autocracy on the one side or Parliamentary absolutism on the other, and the constitutional Judiciary, permanent and non-political, and vested with the power to protect the constitutional Immunities of the Individual against governmental encroachments by any and every branch of the Government. That one is the Argentine Republic. Happily, this is the very state which contains the population which is capable of producing the force necessary to work to advantage this excellent machinery created by its Constitution. The Argentine Republic is, therefore, the light and the hope of South America in the solution of the world problem of the reconciliation of Government with Liberty.

CHAPTER III

MEXICO AND CENTRAL AMERICA

On account of territorial extent, population, proximity to the United States of North America, and more elaborate Constitution, we will consider Mexico apart from the states of Central America. After suffering untold vicissitudes, subsequent to the attainment of her independence from Spain, through internal unrest and unsettled relations to the United States of the North, Mexico finally succeeded in framing and adopting, in the year 1857, a Constitution which contains all the essential parts of a genuine Constitution from the point of view of our problem.

In the first place, this Constitution was originally established by a National Constitutional Convention, that is, by a sovereign power organized separate from, independent of, and supreme over, all Government, which provided in the Constitution a continuing organization of the sovereignty of the Nation for future change in the organic law. This continuing organization, however, while distinguished in the mode of its procedure from the ordinary operations of Government, is compounded, so to speak, of the ordinary governmental organs. Constitutional changes must be made through initiation by the ordinary legislative department of the General Government, the Congress, and ratified by the Legislatures of a majority of the States of the Union. Ordinary law is thus made by the separate acts of the Congress and the Legislature of each State of the Union and constitutional law by the

combined act of the Congress and the Legislatures of a majority of the States of the Union. This is sufficient to distinguish the one kind of law from the other, but it does not fulfil the requirements of separate organization of the sovereignty from the organs of ordinary Government and of commanding power over them.

As to the second factor in the solution of our problem, viz.: the domain of Individual Immunity against governmental power, this Constitution is more satisfactory. It contains the usual Bill of Rights in sufficient fullness. It declares the freedom and equality of all men, the inviolability of property and of the home, and requires due process of law and the equal protection of the law in every legal limitation imposed upon the individual right to life, liberty, and the ownership and enjoyment of property. It declares furthermore, that there shall be no confiscation of property by Government either directly or through unlimited taxation or through the exercise of the power of eminent domain otherwise than for a public purpose and with just and adequate compensation. It ordains the freedom of industrial pursuit, of migration, of religion, of speech, of education, and of the press, the right of peaceable assembly and of petition to the Government for redress of grievances and the right of association for all legal purposes. It forbids torture, imprisonment for debt, and all retroactive law, and guarantees to the people the right to keep and bear arms for their defense. In all this the Mexican Constitution is about as complete an instrument of public law as exists anywhere to-day.

When we come, in the third place, to consider the means constructed by the Constitution for the defense of this realm of Individual Immunity against governmental power,

we have again to concede the completeness in principle of the Mexican instrument. It establishes the Federal system of Government. It adopts the principle of the separation of powers, both as to tenure and procedure. The President is elected indirectly by the voters. The members of the Chamber of Deputies are elected directly by the voters, and those of the Senate indirectly. The President and the Secretaries of his Cabinet, appointed and removed by him at pleasure, are responsible for official crime and misdemeanor only by way of impeachment brought by the Chamber of Deputies and judged by the Senate. The President enjoys with the Houses of the Congress and the Legislatures of the States of the Union the right to initiate bills in Congress, and, while the President may veto any bill passed by Congress, his veto may be overcome by simple repassage of the measure by the two Chambers. Moreover, while the Chamber of Deputies has the privilege of considering first all bills concerning the budget and the recruitment of the Army introduced on its own initiative or that of the President, neither Chamber is accorded the power to overcome the opposition of the other. There is thus, in principle at least, in periods of peace, quite full provisions against Autocracy on the one side and Parliamentary Absolutism on the other. All these constitutional provisions relative to the structure of the Government certainly tend to restrain Government from encroaching upon the domain of Individual Immunity.

Finally, the provisions creating the Judiciary and vesting these tribunals with their vast powers in defense of the sphere of Liberty place the capstone upon the structure from the point of view of our problem. The members of the Supreme Court are made entirely independent

of the other branches of the Government in the origin of their tenure. They are elected indirectly by the voters. But it must be conceded that they are not made sufficiently independent of the voters. Their terms are only for six years. Their salaries, once fixed by Congress, cannot be reduced, but they are subject to impeachment for crime and misdemeanor in office. The Judicial tribunals are, however, vested by the Constitution with the power to declare any act of the central Government or of the States of the Union, whether executive or legislative, null and void which, in their opinion, conflicts with the constitutional Immunities of the Individual, or any act of the central Government which, in their opinion, conflicts with the constitutional powers of the States of the Union, or any act of a State of the Union which, in their opinion, conflicts with the constitutional powers of the central Government. This is all full and explicit and it would seem to cover most of the points required in the solution of our problem.

Briefly surveying, now, all that has been presented, we must concede that, while this Constitution is defective in regard to the first requirement for the successful solution of our problem, viz.: the requirement of a continuing organization of the sovereign power separate from, and supreme over, the Government, a requirement seldom, if ever, in the course of our review satisfactorily met, it contains, on the contrary, the other necessary provisions in some considerable degree of perfection.

Why, then, we naturally ask, with this well-thought-out, well-balanced, and well-constructed instrument of her public law is Mexico the scene of so much despotism at one time and anarchy at another or so much despotism in one place and at the same time so much anarchy in

another? Some of the publicists have pointed to the fact that the Government is expressly empowered by the Constitution to suspend all these declarations and guarantees of Liberty during war, insurrection, and public danger. But in every political system, constitutional or not, this is either expressed or understood. It is quite possible that when this power of suspension is expressed, the Government may be more ready, if not more hasty, in making use of it than when it is understood. There would seem to be a more serious responsibility connected with the use of an implied power than with the use of an expressed power. At least, it is probable that most men would so feel it.

But I cannot consider a so relatively unimportant distinction as this to be the chief cause of the poor success of Mexico in working out her political civilization under such an excellent instrument of public law. I consider that the explanation of this misfit is to be attributed almost wholly to the character of the people and to the manner in which the Mexican state was originally constructed. The ethnologists calculate that not over twenty per cent of the population belong to the white race, while eighty per cent at least are Indian and mixed, in nearly equal numbers. Connect with this ethnological condition the fact that the Mexican state was originally constructed by the imposition, through military force, of the sovereignty of the white race upon the Indian race and that the domination of the white race has been legitimized by the moral and religious power of the Roman Christian Church, and you have, it seems to me, the clew to the explanation. The system of a democratic Republic is not fitted for such a situation, or, rather, such a situation is not adjustable to a democratic Republic. The amalgamation of the white

man and the Indian has produced a mixed race of considerable intellectual as well as physical strength. The struggle of this mixed race to throw off the sovereignty of the white man, on the one side, and to dominate the pure Indian, on the other, has made Mexico a land of revolutions and rebellions and has kept it oscillating between autocracy and anarchy. It will still be decades, perhaps centuries, before its population can develop that necessary consensus of opinion concerning rights and wrongs and that necessary steadiness in upholding the same which are fundamentally essential to the successful operation of that excellent Constitution under which Mexico only nominally lives.

The six states of Central America, viz.: Costa Rica, Guatemala, Honduras, Nicaragua, Panama, and Salvador, while offering some peculiarities when contrasted with the other American states, have less to contribute to the solution of our problem. All of them except the parvenu state of Panama were, before 1839, members of the Confederation of Central America, and the Constitutions of most of them make provision for, or at least mention of, a return to that condition or perhaps to the condition of a more perfect Union.

All of them, having been brought into existence by popular revolution, present Constitutions originally framed and adopted by Constituent Conventions separate from, and supreme over, any Government. In this respect, therefore, they all fulfil one requirement for the solution of our problem. In the constitutional provision for subsequent change of the organic law all of them, except only Panama, require the formation of, and action by, a Constituent Assembly. Panama allows constitutional amendment by vote of two Legislatures, the latter by a two-thirds majority of its members. In all cases, however, it is

the ordinary Legislature which initiates the change according to its own discretion. All fall short, therefore, of satisfying the requirements of a continuing sovereign organized separate from, and commanding over, the Government.

On the other hand, every one of them has provided by constitutional law a realm of Individual Immunity against governmental power fairly well defined and delimited, containing the usual declarations of equality before the law, of freedom from arbitrary arrest and detention, of inviolability of property, of forbiddance of confiscation by limitation upon taxation and upon the exercise of eminent domain, of freedom of religion, of speech, and the press, of the right of assembly and petition to Government and of association for all legal purposes, and requiring that every act of Government touching this realm at any point shall follow due process of law constitutionally ascertained. It must be conceded that even these insignificant states have, as almost all the other states of the modern world, fairly well stated in their Constitutions the elements of Individual Liberty and Immunity against the powers of Government.

But when we come to the crucial test, to the inquiry for the means provided for protecting these Immunities against attempted encroachment by Government, we find the most of them lamentably lacking. This is not apparent in the relation of the Legislature to the Executive. The Constitutions of all of these states contain the principle of the separation of powers and the independence, under co-ordination, of the departments of Government. The President is in every case but one, Costa Rica, elected directly by the voters. In Costa Rica he is elected indirectly. The same voters elect the members of the Legis-

lature. The President and his Ministers are responsible for crimes and misdemeanors in office. They may be impeached by the Legislature, and since, as we shall see, the Legislatures of all these states are unicameral, they are judged in every case but one by a Judicial tribunal. The exception is the case of Panama, whose Constitution provides that the Legislative body may try upon its own accusation. The President has also the power both of initiating and vetoing measures. The legislative Chamber may, in all cases, reject his propositions and may overcome his veto by repassage of any vetoed measure by a majority of two-thirds of the members. Thus far the principle of these Constitutions as to the structure of the government is the check-and-balance system.

When, however, we come to the structure of the Legislature, we find, as above indicated, that the unicameral system prevails exclusively. The want of a twofold consideration for every project of law is, of course, generally unfavorable to the maintenance of the balance between Government and Liberty, especially when, in some cases, the President has no veto at all upon the budget bill. The radicalness of this legislative structure is, it is true, in some instances, as in the case of Nicaragua, somewhat modified by the length of term of the members of the legislative Chamber and by the gradual change of membership in that body, the term being, in this case, for six years and the change by thirds.

It is, however, when tried by the most crucial test that we find the Constitutions of these states most lacking from the point of view of our problem. The Courts are composed of Judges chosen in every case, except that of Panama, either by the voters or the Legislature, generally by the Legislature. Moreover, the terms exceed in no

case six years, generally not more than four years. They are thus not protected against the Legislature in the maintenance of Judicial independence.

Finally, in no case, except that of Nicaragua and that of Panama, are the Judicial tribunals authorized to nullify a legislative act, which in their opinion conflicts with the constitutional Immunities of the Individual. The Constitution of Nicaragua vests this power in the Courts whenever the question may judicially arise, and the Constitution of Panama requires that, when the President vetoes any bill sent to him by the Legislature on the ground of its unconstitutionality as alleged by him, the measure shall be submitted to the Supreme Judicial body for its opinion, and that, if this body sustains the President's contention, the bill shall fail.

But while the constitutional institutions and methods of these states leave much to be desired from the point of view of our problem, it is not this which presents the main failing. It is again, as in South America and Mexico, the character of the population—I will not say people, because this word denotes a population further advanced in political civilization than exists in any of them. All six of them contain a population of less than six millions of persons, of whom ninety per cent at least are Indians, Negroes, and Mestizos. Constant revolutions and rebellions and constant interference by foreign powers render it impossible for these miniature states to contribute anything to the solution of our problem. Their Constitutions were given them by the handful of white men who dominate in each, and, while from a theoretical point of view these instruments are not without considerable merit, yet they give us no test of the character of the great mass of the population and they are misfits in every case.

CHAPTER IV

THE STATES OF THE WEST INDIAN ARCHIPELAGO

Coming finally to the three states of the West Indian Archipelago, Cuba, Hayti, and Santo Domingo, we find some advance over those whose constitutional and political conditions we have just considered. But this advance is chiefly in the instruments of constitutional law which have been made for them directly or indirectly by outside forces.

Of the three, naturally the Constitution of Cuba is the most perfect and gives more satisfactory answers to the requirements of our problem.

In the first place, this Constitution was framed and adopted by a Constituent Assembly separate from, and supreme over, any part and all parts of the Government.

In the second place, the sovereign power for changing the organic law, as provided in the Constitution, is likewise in its organization separate from, and supreme over, the Government. It is a Constituent Convention. But this Convention must be called by a governmental act and it has no power to initiate a constitutional change. This power belongs solely to the ordinary Legislature by a two-thirds vote in each Chamber.

In the third place, the Cuban Constitution contains the declaration, in full measure, of the Immunities of the Individual against the powers of Government. These have been so often mentioned in detail that they do not need to be repeated here.

In the fourth place, the construction of the Government on the check-and-balance principle, the universal American principle, furnishes a certain probable protection of this domain of Individual Immunity against governmental encroachment. The President is chosen by the voters through electors for a term of four years. He appoints and dismisses at pleasure the members of his Cabinet. He and they are subject to impeachment instituted by the Chamber of Deputies and tried by the Senate. He has no power to initiate law save by way of a message to Congress, except in proposing the budget, but he can veto bills passed by the two Houses of the Legislature and this veto can be overcome only by a two-thirds vote in each House. The Legislature consists of two Chambers, the members of one elected directly by the voters, changing totally, and having a term of four years, the members of the other elected by the Councillors of each province in assembly with an equal number of adjuncts chosen by the voters, changing by halves, and having a term of eight years, and each Chamber having equal power in the initiation and enactment of law.

Finally, the Constitution provides for a Judiciary in which the Judges of the Supreme Court shall be appointed by the President, by and with the consent of the Senate, with life terms, and an irreducible salary, and vests in this supreme tribunal the power to nullify legislative acts as well as executive acts when coming into conflict with the Constitution, especially those provisions of it which protect the constitutional Immunities of the Individual against the encroachments of governmental power.

The independence of Cuba and this Constitution are virtually under the protectorate of the United States of North America, not only against foreign aggression, but

against the Cubans themselves. It is, therefore, not exactly correct to denominate Cuba a sovereign state. Its geographical and strategic position across the entrance to the Gulf of Mexico makes it necessary that its relation to foreign powers especially should be under the control, in greater or less degree, of the United States.

When compared with this Constitution, created in close imitation of that of the United States, the Constitutions of the other West Indian states appear quite faulty. They are two in number and occupy the island just east of Cuba in unequal parts, the territory of the state of Hayti amounting to some ten thousand square miles and that of Santo Domingo to some twenty thousand.

The Haitian Constitution of 1887 manifests the influence of the present French instrument. It was created by a Constituent Convention separate from, and supreme over, the Government; but the amendment of the same is effected by means of a proposition passed in the ordinary way for enacting Statutes by the ordinary legislative Houses and approved by the two Houses in joint assembly elected immediately after the passage of the proposition. The distinction, thus, between the sovereign power and the legislative branch of the Government is, as to the membership of each, entirely lacking. Nor is the method of procedure entirely distinct, the origination of the proposition following the method of enacting ordinary Statute law.

This Constitution contains, however, a very complete Bill of Rights or Immunities, in which all of the usual points are fully elaborated, and which need not be cited here in detail, since they have been so often enumerated.

It is, as usual, when we come to consider the means provided for the protection and maintenance of these Im-

munities that we find the least assistance in the satisfactory solution of our problem.

Regarding, first, the construction of the Haitian Government and the relation of its parts, we find that the Executive, the President, derives his tenure from the Legislature, which in joint assembly of the two Houses elects him by a two-thirds majority vote, and that he with his Secretaries of the administrative departments is responsible to the Legislature by way of impeachment initiated by the Lower Chamber and tried by the Senate. He is vested with the power both of initiating bills and of vetoing the acts of the Chambers, and, for defending the bills which he may initiate and also his vetoes, he may send his Secretaries into the Chambers and demand that they be heard, but his veto may be overcome by a two-thirds majority vote in each Chamber. Moreover, while the Legislature is constructed on the bicameral principle and the two Houses have parity of powers in legislation, except that the financial measures must either originate in or be considered first by the Lower House, the Commons, the members of the Senate are chosen by the Lower House, which exercises thus an indirect control over the acts of the Upper House.

Finally, while the High Courts are created by the Constitution and the Judges of these Courts are appointed by the President and hold during good behavior, *i. e.*, for life, and enjoy salaries fixed by law and have the power of refusing to apply any unconstitutional act, the Constitution expressly declares that the final authoritative interpretation of all law belongs to the Legislature alone.

Thus neither in the check-and-balance system of the two political branches of the Government nor in the powers of the non-political branch, the Judiciary, do we

find any sufficient defense of the pompous declaration of Rights and Immunities against the encroachments of governmental power.

The Constitution, lastly, of Santo Domingo is even less satisfactory in the answer it gives to the queries of our problem.

It was, it is true, originally formed and adopted by a Constituent Convention entirely separate from, and supreme over, the governmental organs and the powers conferred by it upon them; but the sovereign power as organized by and in the Constitution for all subsequent changes of the organic law is confounded with the Legislature. It is simply the Legislature acting by a two-thirds majority vote.

On the other hand, the Constitution contains a complete declaration of Rights and Immunities for the Individual against governmental power, the details of which I will again pass over since they have been so often recited in the course of this work.

The construction of the Government is probably more favorable to the protection of this realm of Individual Immunity against its own encroachments upon it than in the case just preceding, the case of Hayti. In the first place, the Executive, the President, does not derive his tenure from the Legislature, as the Haitian President does, but is elected by electors chosen by the voters for this purpose, and has a long term, six years. His responsibility, with that of his Secretaries of State, is enforced by arraignment before, and trial by, the Supreme Judicial body. He also has the power of initiating bills and of vetoing bills passed by the two Chambers, which veto can be overcome only by a two-thirds majority vote in each

House of the Legislature. This is a much more independent position than that occupied by the Haitian President, and enables him to check much more successfully the movements of the Legislature toward Parliamentary absolutism. The Legislature is composed of two Houses and the principle of the bicameral system is further maintained by according substantial parity of powers to the two Chambers, both in the initiation and passage of projects of law.

The protection offered by the construction of the political departments of the Government, the Legislature, and the Executive, to Individual Liberty is only a probable one at the best, and depends upon the wisdom and moderation of these bodies instead of upon any constitutional restrictions.

The position and powers of the Judiciary furnish, as we all know, the real test; and in this respect the Dominican Constitution is greatly lacking from the point of view of our problem. The Judges of the Supreme Court are elected by the Legislature, hold for a very short term, four years, and the Court is not clearly vested with any power to protect the constitutional Immunities of the Individual against governmental encroachment. The Constitution, it is true, forbids the enactment of any law in conflict with its own provisions and vests the Supreme Court with the power to determine which law governs a case when more than one law appears to be involved in it. A determined Court sustained by a judicially minded people might make out of this the power of the Court to determine the constitutionality of legislative acts and nullify such as, in its opinion, conflict with the provisions of the Constitution, but such a Court and such a people do not exist in the state of Santo Domingo.

We must, therefore, turn away with disappointment from the consideration of this state, not so great indeed as in many other cases, since we did not expect to obtain much help from it in the solution of our problem. It presents neither stable Government nor protected Liberty.

When, now, we compare the Constitutions of South and Central America, Mexico, and the West Indian Archipelago with those of the European states, we must concede from the point of view of our problem that they are more complete and contain fuller and more satisfactory answers to our inquiries. They were all drafted by Spanish or Portuguese scholars and based by them upon the political philosophy of the French Revolution. They are almost all of them excellent instruments from a theoretical or philosophical standpoint. Why, then, are the results of the efforts to apply them so unsatisfactory? Why is the history of these states in so great measure the record of alternations between anarchy and despotism instead of steady progress in the reconciliation of Government and Liberty? We must look to the character of the population—I will not say "people"—of each of them for the explanation.

We are in the habit of calling these populations Latin-Americans and of attributing to them the political psychology of the Latin races of Europe. But with the exception of the inhabitants of Argentina, Chili, Cuba, and Uruguay there is not a predominant Latin population in all the Americas south of the United States of North America, and the inhabitants of Chili, Cuba, and Uruguay can be termed such only when we concede that the Spaniards and Spanish Creoles are Latins, which is not now generally acknowledged by the ethnologists.

Brazil has a population of 24,000,000, not 20 per cent of which belong to the white race. Full 80 per cent are Indians, Negroes, and Mestizos. Bolivia has a population of some 2,000,000, of which hardly 12 per cent are white. The rest are Indians and Mestizos. Colombia has a population of about 6,000,000, not 20 per cent of which are white. The rest are Indians and Mestizos. Ecuador contains about 1,250,000 inhabitants, almost all of whom are Indians and Mestizos. Paraguay has less than 1,000,000 inhabitants, nine-tenths of whom are Indians, Negroes, and Mestizos. Peru with some 3,000,000 inhabitants has probably 10 per cent of whites. Venezuela with about the same population as Peru is in about the same condition ethnologically. The six Central American states covering something over 200,000 square miles of territory, inhabited by less than 6,000,000 persons, contain, in no case, a white population of over 20 per cent of the whole. The same is true of Mexico. While of the three West Indian states inhabited by something over 5,000,000 persons, Cuba alone has any claim to be classed as Latin in its population.

From this brief survey of the statistics of population we see easily that of the twenty countries with which we are dealing only four can with any degree of accuracy be classed as Latin in population. It cannot even be claimed that the small ruling class in the others is composed, in every case, of Latins, even if, as I have said before, we class the Spaniards as Latins.

In fact, we have to do here with Indian populations, living under white-man Constitutions, which they do not understand, much less appreciate. These Indian populations are not fitted as yet for Constitutions which rest upon the principles of national consensus and individual

worth. Tribal organization and communism of goods were the main elements of the life—I will not say "civilization"—natural to them.

They never have been satisfied and are not now satisfied with the system imposed upon them by the Europeans. They do not seem to be able to rise to the enjoyment of its advantages. They feel oppressed by its opportunities, of which they can make little use. The very Liberties guaranteed to them by these Constitutions appear only to give the intelligent, not to say crafty, the means for overreaching them. A benevolent despotism would best fit their situation and stage of development. A democratic Republic with such populations is a wicked farce. It is dispiriting to feel that any human beings are incapable of civilization. We ought not to give way to such pessimism, but should keep on striving with our means of education and example for their uplift. Nevertheless we must be patient with much that is disheartening and remember that many centuries of effort and development were necessary to bring the white man up to his still imperfect civilization. These excellent Constitutions may seem to us to be chiefly waste paper, but they are not. They are a great object-lesson. They are a great rallying-point. They show men where at last the political pendulum, swinging between the extremes of despotism and anarchy, will finally come to rest. With one real state in South America, Argentina, and one real state in North America, the future of all the Americas is never to be despaired of.

CHAPTER V

THE NEW UNITED STATES OF NORTH AMERICA

The solution presented by the Constitution of the United States of North America to the great problem of this study was, as we know, the solution as it stood at the beginning of the year 1898. As we have seen, the Civil War of 1861–5 had, through the Thirteenth and Fourteenth Amendments to the Constitution produced by it, added to the Immunities of the Individual against the powers of Government, and the balance between Government and Liberty as thus regulated seemed to be fairly struck. We seemed to have found the solution in principle of the great problem of political civilization and to be engaged now with the work of its application to details. But with the year 1898 came a turn in affairs, which has changed materially, if not completely, the course of our development.

The influences under which we now came were those springing out of the experiences of a war of conquest. It is hardly credible that this Government went into the Spanish War of 1898 with any conscious purpose of conquest. It is practically certain that President McKinley entertained no such thought. But it is the natural result of victory in foreign war that the victor must take his indemnity, in part at least, in territory. The Spanish-American War of 1898 was no exception to the rule, and

we came out of it saddled with Porto Rico and the Philippines and with obligations in regard to Cuba, all of which have cost us not only blood and treasure, but have led or misled us into new paths of development whose termini have not yet been reached—in fact, not yet discovered.

Territorial expansion was no new thing for these United States at the beginning of the last decade of the last century. From the beginning of the nineteenth century onward our history had been one of expansion, but it was expansion upon this Continent, generally from East to West, and the newly acquired territory was quickly settled by our own blood and race relatives from the East.

The Constitution provided a way to govern the people occupying such territory and for granting to them at the proper time the powers of a State of the Union. These constitutional provisions were, it is true, a little ambiguous. They read: "Congress shall have power to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging to the United States," and "New States may be admitted by the Congress into this Union." These provisions are to be found in Article IV of the Constitution, not in Article I, which contains the clauses respecting the organization and powers of Congress. This fact also tended to make the meaning of these provisions obscure. Nevertheless Judicial decision and practise had, before the middle of the nineteenth century, substantially settled by interpretation the main points of these provisions. Under these interpretations it was settled as constitutional law that when by treaty, conquest, or any other method of acquisition, territory was taken by the United States Government for the United States, such territory was at first governed by

the President, as Commander-in-Chief of the military power, until Congress should establish Civil Government therein, but that the Government by the President, in so far as martial law was not made necessary by a state of war or rebellion therein, and the Civil Government established therein by Congress, were both under the limitations imposed by the Constitution upon all Government in behalf of the Private Rights of the Individual and his Immunity against all governmental power; and that the automatic effect of Congress admitting any part of such territory into the Union as a State was the still further limitation of the powers of the United States Government or any branch thereof over the inhabitants of such territory by authorizing them to assume that part of the whole governmental power ascribed by the Constitution to a State of the Union.

The famous Dred Scott decision of the year 1857 appeared to limit even further than this the powers of Congress in the Government of the Territories of the Union, denying to Congress the full powers of Government under the limitations only of the constitutional Immunities of the Individual, and restricting it to the powers absolutely necessary for holding them as the property of the United States. After the Civil War and the constitutional changes in behalf of Individual Liberty resulting from it, the old doctrine was re-established, recognizing to Congress the general powers of Government in the Territories limited only by the constitutional provisions defining and guaranteeing the fundamentals of Individual Liberty.

These principles remained unquestioned down to the close of the War with Spain of 1898, when the acquisition of Porto Rico and the Philippines and the annexation of the Hawaiian Islands, that is, of territory separated

by broad bodies of water from the Continent, precipitated the question of the powers of the United States Government over the inhabitants of these regions and of their Liberties under the Constitution. This question was tested under the two main issues of the powers of Congress to levy special duties upon articles of commerce between these lands and the other parts of the United States and to authorize the prosecution of persons for crime within these lands without Grand Jury indictment.

The Constitution provides that all duties, imposts, and excises shall be laid with uniformity throughout the United States and that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment by a Grand Jury; and the Supreme Court had decided in the well-known case of Loughborough *vs.* Blake that the phrase United States in this connection comprehends all territory subject to the jurisdiction of the Government of the United States. Nevertheless Congress imposed duties upon goods brought from these regions into other parts of the United States, and duties in these regions upon goods brought from other parts of the United States into them, without imposing the like duties upon goods going and coming between the other divisions of the United States and authorized prosecution for crime in them without Grand Jury indictment. The constitutionality of these Congressional Acts was tested in the well-known cases of DeLima *vs.* Bidwell, Downs *vs.* Bidwell, Dooley *vs.* the United States, and Hawaii *vs.* Mankichi in the years 1901–2, and they were pronounced constitutional.

Let us now see, if we can, what must be the constitutional principle upon which these decisions rest. It must be that when foreign territory is acquired by the Govern-

ment of the United States, or by the United States through its Government, then the Government of the United States over the inhabitants of such territory is unlimited, until by a specific Act of Congress the limitations provided by the Constitution on governmental power in behalf of Individual Liberty are extended to them. We cannot logically stop short of this, however much some of the Justices seemed to be disturbed by it. What seemed to disturb them, however, was the idea that the Congress, the creature of the Constitution, should be held to be, to such a degree, master of its creator as to determine when and where it should be held to be in force. Some of them tried to escape this embarrassment by the completely arbitrary assertion that when Congress shall have formally introduced the Constitution into such places, it may never withdraw the same from them. The only completely logical position is that the clause of the Constitution which vests in Congress the power to make all needful rules and regulations respecting the territory and other property of the United States must be interpreted as vesting in Congress the unlimited powers of Government, that is sovereignty, in such regions, and that when Congress introduces the limitations upon Government in behalf of Individual Liberty recited in the Constitution it does so simply as a Congressional Statute, having only the force of a Congressional Statute and subject to the vicissitudes of a mere Statute, that is, of being modified or repealed by the power enacting it and of being declared null and void by the Courts. The fact that such limitations were expressed by Congress in its Statute in exactly the same words as those employed in the Constitution or were simply referred to by Congress as such and such provisions of the Constitution cannot change their nature when

enacted by Congress under its power to make all needful rules and regulations respecting the territory or other property of the United States. They became simply parts of a Congressional Statute and as such subject to modification and repeal by Congress at will. This view of the subject relieves us of the embarrassment of attributing to Congress a power over the Constitution in reference to such territory, a power to let the Constitution in or keep it out of its own volition, and at the same time it places that despotic power in the hands of the Government of the United States necessary to the successful realization of an imperial policy, necessary to the Government of Colonies and Dependencies inhabited by people incapable of self-government.

The only trouble about taking this completely logical position thus frankly expressed is that it makes the Government of the United States, in such territory, simply despotism, benevolent and beneficent, perhaps—yes, probably —but a despotism, stripped of every bit of constitutional hypocrisy and standing there bald and bare and unmistakable. There is no question that an unlimited Government is necessary for the successful realization of a colonial policy, *i. e.*, unlimited in the early periods, at least, of rule in the Colony or Dependency.

But what will be the reflex influence upon the Government at home of exercising despotic or unlimited power in Dependencies? What will be the effect upon other parts of the Constitution of finding one part where in time of peace and civil administration there is no limitation upon the powers of Government? May not this prove to be:

> "The little pitted speck in garnered fruit,
> That rotting inward slowly moulders all"?

I cannot forget the great struggle in the Supreme Court of the United States over these deep questions nor the differences of opinion upon the vital points, so great that only a bare majority of the Justices upheld the decisions and they could not agree concerning the principle upon which to base it. The Irish wit of Mr. Dooley properly described the situation when he told his friend Hennessey that the decision in these cases was rendered by Justice Brown, eight Justices dissenting. Nor can I ever forget the grave concern which spread over the country, especially among men learned in the peculiar character of our constitutional law. The newspapers and magazines were filled for a long time with criticisms upon these decisions and the reasoning upon which they were supported. Gradually the sounds of the conflict died away and the assimilation of the new aliment went silently on transforming the national tissues and preparing the national opinion for another and a much greater change in our constitutional adjustment of Government and Liberty to each other.

The occasion of this change was the vast development of the Corporation system in the business of the country, effected during the twenty years from 1890 to 1910, and the popular hostility to the Corporations and the methods attributed to them.

Few men in this country have ever troubled themselves to inquire deeply and impartially into the nature of a Corporation, especially a private Corporation. They generally have some kind of a vague conception that it is some sort of a devilish contrivance through which a few malevolent and greedy spirits are gradually absorbing the wealth of the world. It must be confessed that it has only too often subserved the purpose. But we must dis-

tinguish the nature of the thing from the ends which it may be made to promote.

A Corporation is nothing but a combination of human beings, who have been authorized by Government to do business under certain privileges, the chief among which are perpetuity and limited liability, not limited liability of the Corporation but of the stockholders, the members of the same. Most people in these United States who have saved and invested a little money are now members of one or more of these bodies, and the powers of Government which correspond naturally to the corporate privileges just mentioned are those of revocation of such privileges for proper cause, periodical revaluation of the franchise and enforcement of the requirement that the real and nominal capital shall correspond.

The Corporations exploited by dishonest officials and directors for improper self-enrichment are few in comparison with those which are not, but the many have to bear the sins of the few, and the politicians know that, with universal suffrage, there is no surer way to popularity and office than to acquire the reputation of a trust-buster. The exercise of greater power over Corporations by Government, of power beyond the natural limitations upon the privileges granted them, has been claimed and approved on the ground that this was necessary to protect the Liberty of the Individual. Corporations were made subject not only to an administrative control not imposed on the same business when carried on by individuals or firms not having corporate privileges, but Corporations were singled out and a tax upon their incomes, which is nothing else than the incomes of the individual stockholders, was imposed under the title of an excise tax upon their privileges as measured by their incomes.

The Supreme Court approved of this exaction not as being a tax upon property nor upon the income from property, but as a license to do business under corporate privileges. The difference, from the point of view of constitutional law, lay in the principle that, as a tax on property or the income from property, it would have been necessary to have distributed the same among the States of the Union according to their respective populations, while as a license or excise it was only necessary to levy it with uniformity throughout the United States. This latter was what the friends of the exaction wanted and the Judicial decision was a triumph for them.

Encouraged by the success of this move they now succeeded in influencing Congress to enact a measure imposing a tax upon the income of Individuals, calling it an excise. They called it a measure for extending the excise upon Corporations to Individuals. The purpose was to avoid the necessity of distributing this exaction among the States of the Union according to their respective populations, and to levy it under the limitations of uniformity throughout the United States. The inhabitants of the South and the West have manifested the view that under this limitation the burden of the exaction could be made, by the fixing of the exemption clause, to fall upon the East, and have also manifested their desire to do this; while the politicians of all sections have revealed the purpose of throwing the burden of the exaction, by means of this same contrivance, upon the relatively few, making the tax, thus, popular among the exempted majority. Without any exemption, the tax, whether levied on the principle of distribution among the States of the Union according to their relative population or on the principle of uniformity throughout the United States,

would be a fairly just and equal tax, since the larger incomes are generally to be found where the larger populations exist. The desire to class this tax as an excise instead of a direct tax is, therefore, to be explained only in this way, viz.: that as an excise, exemption from the burden might be accorded to some and not to others, while as a direct tax this could not be well effected.

It is difficult to see, however, how any exemption was compatible with the principle of equal protection of the law. We all feel that this is a very fundamental limitation upon all Government in our system, but, while it is an express constitutional limitation on the powers of the States of the Union, it was, as to the National Government, only an implied limitation, if indeed it existed at all, implied in this case from the provision that all imposts, duties, and excises must be uniform. But even admitting that the National Government was under no constitutional requirement to accord equal protection of the law, it is still very difficult to see how a tax upon the income of an Individual could be classed as an excise. An excise is a license tax, a tax upon the permission to do something. It would sound rather strange to American ears to hear that an Individual must have the permission of Government to earn his living and pay for it as a privilege, without regard to the pursuit he may follow or the work he may do.

The President apparently regarded the attempt to tax the incomes of Individuals under the name of an excise as a subterfuge, as a way of escaping the decision of the Supreme Court in the case of Pollock *vs.* The Farmers' Loan and Trust Company, which held an income tax to be a direct tax, and which was the authoritative interpretation of the constitutional provision. He, therefore, ve-

toed the bill and the Houses of Congress could not repass it by sufficient majority to overcome the veto. In his veto message, however, the President suggested an Amendment to the Constitution, whereby the income tax might be taken from under the limitation imposed by the Constitution upon the levy of direct taxes and placed under that obtaining with reference to duties, imposts, and excises. I think the President made a grave mistake in recommending this. He simply suggested with approval the idea that things may be given names in the Constitution without any regard to their natural character. In a minor way he was simply repeating the error of the Roman Emperor who called his horse a senator. He had very properly objected to Congress doing this sort of thing, but did not seem to appreciate that the amending power should not do it. He saw clearly that back of Congress was the Constitution as interpreted by the Judiciary, but did not appear to see that back of the Constitution were, or at least ought to be, the sound principles of political science, which deal with things according to their nature, and not as a jugglery of artificial names.

This suggestion on the part of the President has been finally realized in a way which, I cannot believe, he foresaw or would now approve. The Houses of Congress acted quickly and very inconsiderately in formulating the Amendment. The professional politicians were tumbling over each other to find a popular issue. The redistribution of wealth by governmental power was the winning idea of the day among the masses, that is, among the electoral majority, and they framed this Amendment to meet that idea. They masqueraded, indeed, under the high-sounding patriotic principle that the Government should be empowered to get adequate revenue in times

of emergency. But they were understood as they expected to be and intended to be. They framed the crudest, most reckless bit of constitutional legislation known to our history. It simply made waste paper of the Constitution in respect to the relation of Government to the constitutional rights of the Individual to his property. It reads: "Congress shall have power to lay and collect taxes on incomes from whatever source derived without apportionment among the several States and without regard to any census or enumeration." That is, the Sixteenth Amendment takes the tax on incomes, which by the law of the land and by a sound political science is held to be a direct tax, and which, down to the adoption of this Amendment, March 1, 1913, could be laid by Congress only under the limitation of apportionment among the States according to their relative population, out from under this limitation, without declaring this tax to be a duty, impost, or excise, that is, without placing it under the limitation resting upon Congress in laying duties, imposts, or excises, the limitation of uniformity throughout the United States. According to the Sixteenth Amendment the power of Congress to lay and collect taxes on incomes from whatever source derived is now absolutely unlimited. Congress may now exercise the whole power of sovereignty upon this subject.

The vast importance of this subject is revealed when we reflect that a tax on incomes, which may be laid without any constitutional limitations, puts all property and all human effort at the mercy of the governmental body which may lay such a tax. It is not like any other tax. Other taxes cover only a part of the property or a part of the labor or activity of the individual. But the unlimited income tax takes the whole thing or may take

the whole thing at the option of the Government. In fact, since the adoption of the Sixteenth Amendment we have no real constitutional Government upon that most important of all subjects, the relation of Government to the Individual's right to property.

What is genuine constitutional Government? It is not simply a Government based on a written document, without regard to whence that document came and what it provides. Genuine constitutional Government rests upon two fundamental principles, principles without which, whatever else it may be, it is not genuine constitutional Government. These two principles are, first, that it must be representative Government and, second, that it must be limited Government. That is, first, there must be back of Government a more ultimate authority, which decrees the organization of the Government, vests it with powers, and imposes upon it limitations. This body or organization we denominate in political science the sovereign. Now, in genuine constitutional Government this body must not govern. If this body should govern, such Government would necessarily be absolute and unlimited, since, as the original and most ultimate authority in the order of authorities, there would be nothing back of it which could control or restrain it.

But this is not yet enough for the establishment of genuine constitutional Government. Constitutional Government must be representative Government, but representative Government can exist without being genuine constitutional Government. Let us suppose, for example, that there exists in a given political system a sovereign power organized back of, separate from, and supreme over the Government, but that it should vest all of its own power without exception or limitation in the Government,

or all of its power in regard to certain most important subjects in the Government, such a Government would be representative, but it would not be constitutional in any true and genuine sense of the word. It would be an absolute Government, in whole or part, no matter how benevolently disposed. In order to be constitutional it must be subject to limitations imposed upon it by the sovereign in behalf of the Rights and Immunities of the Individual. Constitutional law is a body of limitations on governmental power and you dare not call any document a Constitution, no matter from what source it may come, which is not such. It would not solve, in the slightest degree, the great problem of political history and political science, the reconciliation of Government with Liberty. It would simply sacrifice Liberty to Government.

Now, the sovereign, through the Sixteenth Amendment to the Constitution, has done just this in regard to the rights of the Individual to his property. It has made over to the Government the whole power of the sovereign, unlimited and unqualified, to take what it will and in any way it will from the Individual, to take from one Individual and not from another, as it will, and to take in different proportion from different Individuals, as it will. This is not a power of constitutional taxation. It is the power of confiscation. It is folly for us to imagine that we have any longer a Constitution in regard to the relation between Government and the Individual in his rights to property or even to his own physical or mental efforts. That is all gone and past and it remains now to be seen what the reflex influence of this vast change will be upon the other parts of the Constitution.

Congress has made swift use of its new power. It has passed an Act for the taxing of incomes, which is highly

discriminatory and arbitrary in many directions, although it was generally understood that Congress would make no use of the power granted in the Amendment except in times of great emergency. The Act was a retroactive law. It confounded principal with income. It exacted payment of the tax, in part, before it was due. It discriminates against living in regular wedlock. It discriminates against persons having incomes of from three to one hundred thousand dollars as compared with persons having incomes of less than three thousand dollars, on the one side, or more than one hundred thousand dollars on the other. And it requires private parties to act as governmental collection agents without holding office or receiving salary.

Under the Constitution as it was before the Sixteenth Amendment all this would have been fatal to the constitutionality of the Act, but under the Sixteenth Amendment, which is the last word of the sovereign upon this subject, I do not see how these things, or anything else which the Congress may choose to do in regard to an income tax, can be judicially nullified, or nullified in any way, except by another Amendment.

It is, indeed, a fundamental principle of hermeneutics that all parts of a Constitution or any other legal instrument must be taken together and each part so interpreted as to give every other its natural force and meaning. But this principle has full force only when all parts of the instrument are enacted at one and the same time. Where, on the contrary, it consists of a number of successive enactments, as in the case of a Constitution with Amendments, then another equally fundamental principle controls, viz.: that the last will of the sovereign is law and displaces everything preceding in conflict with it.

Look at it as we may, the new interpretation of the

provision of the Constitution giving Congress the power to make all needful rules and regulations respecting the territories of the United States, whereby Congress is held to possess unlimited power in the Government of the Territories and Dependencies of the Union, and the Sixteenth Amendment to the Constitution, have given us a new political system, one in which Government is accorded far greater powers than it possessed in our system before 1898. There is nothing now to prevent the Government of the United States from entering upon a course of conquest and of empire, especially throughout the Americas, to which the more and more extravagant interpretations of that idol rather than ideal of our policy, named the Monroe Doctrine, is ever tempting us. We are by no means a peaceably inclined people. The continuous conquest of a new country from the savage, the wild beast, and the jungle, through a period of three centuries, does not tend to produce a peaceably inclined people, but an adventurous, warlike, and vainglorious people. In fact, besides being belligerent and boastful, we are restless, nervous, and at times hysterical. We have just the qualities to answer the call of a Napoleon in the Presidency. And now that the Government has free hand with the purse-strings of the rich, without being compelled to consult them in the slightest degree as to the amount it will take and as to the purpose to which it shall be applied, and since Congress has become a body rather for approving the plans and deeds of the President than for controlling him and for legislating independently, it is possibly only a question of time when our Napoleon will appear and take advantage of these opportunities; at least, it would only be natural that he should and it is to be apprehended that he will.

The events of these sixteen years since 1898 have brought about a serious readjustment of the relation of Government to Liberty in our political system, and that to the advantage of Government at the cost of Liberty. And the tendency which still manifests itself is to move right on in this line of development. And I do not see that the measures proposed in some quarters as a means of controlling it will have the effect. In the long run it seems to me more probable that they will facilitate and accelerate it. These measures are known as the popular initiative, the referendum, and the recall. The idea in them all is, as most of their supporters claim, to increase the influence of the people over the activities of Government, and it is simply assumed by them all that this is a good thing, to any degree and effected in any manner. Both of these points, however, need further and much more particular and accurate consideration.

In the first place, the influence of the people over the Government, where the principle of popular sovereignty is the basis of the Government, cannot be advanced to the point of the people, as sovereign, actually governing, without destroying the limitations upon governmental power, that is, without making Government absolute, without setting constitutional Government aside, since constitutional Government means nothing at all unless it be representative limited Government. The line between influence and control must be correctly and carefully drawn. The sovereign must not be substituted for the Government. What will generally, if not always, happen is that it will not be the sovereign people, that is, the whole people in sovereign organization, which will control the activities of Government, but that it will be a certain part of the people, not that part which is occu-

pied with private business, with making a living and something more with which to pay taxes, but that part which is loafing about the public buildings, liquor saloons, and gambling-houses, waiting for something to turn up whereby a job, a rake-off, a concession, or a divide of some kind may be had; in other words, it will be "the mob of the Forum," that part which one day plunges society into anarchy and the next day is shouting hurrahs for Cæsar. The trouble with the whole scheme is, from the point of view of sound political science, that it seeks to introduce something having legal force between the sovereign and the Government, between the sovereign and the constitutional Liberty of the Individual, a something which destroys constitutional Government, on the one side, and suppresses Individual Liberty, on the other, and finally falls itself a prey to the supreme demagogue of the day.

There is nothing sound in the popular initiative, which may not now be better attained by the existing right of petition. There is nothing sound in the referendum except the occasional appeal to the actual sovereign to amend or revise the organic law. There is no appeal in a sound political science from Government except to the sovereign, and the frequent appeal to the sovereign in the ordinary work of Government displaces, as I have already said, constitutional Government by unlimited Government. I do not criticise the referendum as being radical, the common objection to it. It is not always radical. It is frequently conservative and sometimes conservative in a very bad sense. It sometimes prevents the Legislature from doing what ought to be done, and it always lessens the sense of responsibility on the part of the Legislature; it always has a deteriorating influence on Government.

Finally, the recall when applied to elected officials is

simply a method of dismissing elected officers by the body which elects. It has, certainly, some sort of an analogy to the principle of appointed officials being subject to dismissal by the same authority which appoints them. It tends to give the electorate within an administrative division a certain control over the officials chosen by it. When applied to members of a legislative body it reverses the principle contained in most of the Constitutions of the present day, viz.: the principle of uninstructed representation, the principle which holds that it is the judgment of the legislator and not the will of the voter which should make the law. The recall when applied to the legislator is the old question of will against reason in the philosophy of legislation, it is the Romanic principle against the Teutonic. When applied to officials, all there is of value in it may be found in the existing process of impeachment. When it goes beyond this it will prove, in most cases, to be only another encouragement not to execute the laws against those who are interested in what is vulgarly known as the "wide-open town." Everybody knows that the majority of the active men in American politics constitute, as a rule, that quarter of the electorate pecuniarily interested in the liquor saloons, the gambling-houses, the brothels, and in the schemes of organized labor, the first named figuring chiefly in local politics and the last named chiefly in State and national politics. These men are generally without any public sense. They are bound together by class interest and seek to use public power for private ends or to prevent the use of public power for the general good. They control by lending their aid to that party which will go furthest in securing the enactment of legislation friendly to their peculiar interests or in preventing the enforcement of legislation not partial to those interests. They

have the most compact and active organization existing in the politics of to-day, and they are just the men who would be most likely to engineer the recall of officials and emasculate the administration of all law not intended and calculated to further their class interests. What are generally termed the "interests," the "capitalistic interests," would also find in the recall an opportunity to control officials. Probably anybody who really knows anything about practical politics and is himself not seeking office or popular applause will testify that the influence and power of the capitalistic interests are usually overrated, simply because the force of numbers in the electorate is against them. But whatever influence they may have would be intensified by the opportunities of the recall. Especially would this be true if the recall should be applied to the Judges of the Courts.

Neither political science nor the general constitutional law of the present favor the principle of the appointing power having the power of dismissal in the case of the Judge. The Judge is not executing the orders of a governmental superior as is the executive officer. He is exercising a judgment, and therefore a discretion, supposed to be superior to that of the person or persons who appoint him or the voters who elect him, in the interpretation and application of the law. No intelligent and independent administration of justice could be maintained under such a practise. The test of constitutional Civil Liberty is the power to uphold the Rights and Immunities of a single Individual, not only against a majority of those who would probably participate in the recall of a Judge, but against a majority containing every other individual in the State or nation. Nothing short of the inviolable tenure of the Judge can secure this. It is quite

enough that he is subject to impeachment for crimes and maladministration in office.

But most fatal of all to the existence of constitutional Government and constitutional Liberty would be what is termed the recall of the Judicial decision. This would be nothing short of the substitution of the *will* of a part of the people, especially of that part which would be most ignorant of the true relation of Government to Liberty, for the *reason* of the Jurist in the interpretation and application of the law. This whole scheme of inserting this third something between the sovereign and the Government created and limited by the sovereign can have no other result than the dethronement of the rightful sovereign, the demoralization of the rightful Government, and the subjection of the constitutional Liberty of the Individual to the tyranny of a class pursuing its own interests under the name of "social justice."

No such nostrums as these can be a cure for the disease of governmental absolutism introduced into our body politic by the acquisition of Dependencies and the Sixteenth Amendment. The only way to check the inroads of these spots of decay in our constitutional system is to get rid of all these Dependencies as soon as possible and to amend the Sixteenth Amendment so as to place the power of Congress over the property of the Individual under proper limitations, such limitations as will distinguish taxation from confiscation and hold the Government to its proper aims, aims reached also by proper means.

We are further away to-day from the solution of the great problem of the reconciliation of Government and Liberty than we were twenty years ago. In principle we have too much Government and in practise too slack and

irregular execution of the law. This cuts both ways into the constitutional Liberty of the Individual, for it is generally the law supporting that Liberty which is most faultily executed. Congress has been liberated from all limitations in dealing with the property of the Individual by the Sixteenth Amendment and from a conservative internal structure and composition for the use of this great power by the Seventeenth, which makes of the Senate another House of smaller membership.

It seems to me that we are swaying from the path of true progress. That path must lead ever to the better and more perfect reconciliation of Government and Individual Liberty, and, as we have seen, this signifies, in ultimate analysis, four things, viz.: a true and correct organization of the sovereign power as the basis of all Government and Liberty, so as to give every element and every force within the state its proper value and open the way for its legitimate activity and for the exercise of its natural weight; second, a Government of conservative structure and limited powers, a Government which will not only be proof against the usurpation of a despot, but which cannot be adapted to further the rule of class interests; third, a fully rounded, well-defined sphere of Individual Immunity from governmental power, such as will liberate the physical, intellectual, and moral capacity of the Individual, stimulate it to the fullest development and encourage its service to the advancement of civilization; and lastly, a learned, experienced, impartial, unprejudiced, upright organ for maintaining in detail, through its interpretations and judgments, the constitutional balance between Government and Liberty.

Down to the year 1898, we had all this in fair degree and in fuller measure than any other state of the world.

It needed some readjustments, but no radical or revolutionary changes. But it did not lend itself to an imperial policy abroad nor to a paternal programme at home. A School of Sociologists and Political Economists arose, who, impatient of the voluntary methods of religion, charity, and philanthropy, have sought to accomplish what they call social justice, the social uplift, by governmental force. There is no question that they have exercised a strong influence in directing the thought of the present, and they have taught the politicians that there is no vote-catcher in a system of universal suffrage comparable to the promise of forcing those who have to divide with those who have not or have less. The Jingo and the Social Reformer have gotten together and have formed a political party, which threatened to capture the Government and use it for the realization of their programme of Cæsaristic paternalism, a danger which appears now to have been averted only by the other parties having themselves adopted this programme in a somewhat milder degree and form. All parties are now declaring themselves to be Progressives, and all mean in substance the same thing by this claim, viz.: the increase of governmental power over the constitutional Immunities of the Individual, the solution by force of the problems of the social relations heretofore regulated by influence, by religion, conscience, charity, and human feeling, the substitution of the club of the policeman for the crosier of the priest, the supersession of education, morals, and philanthropy by administrative ordinance.

Now, all this may be necessary, but is it progress in civilization? It may be that the character of our people has so deteriorated during the last twenty-five years that the ominous change in the relation of Government to

Liberty ought to be made, but let us consider before we do it whether there be not a better way, a more American way; whether a revival of religion and morals, a re-establishment of the influence and functions of the Churches, and an improvement of our system of education may not better subserve the social uplift and still preserve our Liberty.

And let us also profoundly reflect what may be the effect of a vast advance in governmental power and activity. In his criticism of Hasbach's recent most valuable work upon *Modern Democracy*, Professor Schmoller relates that when, in the year 1890, the question of social reform was being considered by the Prussian Council of State, the Emperor uttered these profound, and for so young a man, remarkable words. He said: "Das Mass erträglicher socialer Reform ist bedingt durch die Stärke der Staatsgewalt und deshalb ist bei uns Vieles möglich, was anderwärts vielleicht gefährlich wäre." That is, a permanent, stable, powerful Government, a Government standing over all classes in the Society and independent of them all, might be trusted to say how far force can be safely employed in requiring sacrifices from one class to another, but a changing, shifting Government, a Government representing either the property class, or the propertyless class, especially a Government representing the propertyless or small-property class, a Government representing the modern democracy under universal suffrage, a Government representing the class to be benefited by the confiscation and redistribution of wealth through governmental force, cannot be safely trusted with any such power. It would become a temporary despotism, which would destroy property, use up accumulated wealth, make enterprise impossible, discourage intelligence and thrift,

encourage idleness and sloth, and pauperize and barbarize the whole people.

This is no idle prophecy. The whole history of the world's political development sustains it. The history of that development shows beyond any question or cavil that a Republic with unlimited Government cannot stand, that a Republic, which makes its Government the arbiter of business, is of all forms of state the most universally corrupt, and that a Republic, which undertakes to do its cultural work through governmental force, is of all forms of state the most demoralizing. If a state will have Government undertake those tasks which naturally belong, or have come through historical development to belong, within the sphere of Individual Liberty, then it must have a Government lifted so far above all class and party interests that it cannot be controlled or even influenced by any of them. But this is authority reaching from above downward and not from below upward. This is Monarchy in the original sense of jure-divino sovereignty. This is the reason for and the advantage of its existence. But, for us, this is not progress. It is for us retrogression of the most positive kind known to political history.

In the face of this consideration, it is time, high time, for us to call a halt in our present course of increasing the sphere of Government and decreasing that of Liberty, and inquire carefully whether what is happening is not the passing of the Republic, the passing of the Christian religion, and the return to Cæsarism, the rule of the one by popular acclaim, the apotheosis of Government and the universal decline of the consciousness of, and the desire for, true Liberty. The world has made this circuit several times before. Are we making it again or is it only a step backward in order to get a better foothold for

another advance in the true direction? Let us hope it is the latter and make it so by keeping always consciously before us as the goal of political civilization the reconciliation of Government with Liberty, so that, however, the latter shall be seen to be the more ultimate, shall be seen to be both end and means, while the former is only means. This is fundamental in the profoundest sense and there can be no sound progress in political civilization without it.

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